Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

RICHARD E. FOX,

Petitioner,

v.

RALPH COYLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Should the Sixth Circuit have granted a certificate of appealability to determine whether the Eighth and Fourteenth Amendments permit state courts to convert mitigating evidence into an aggravating factor in reviewing a capital sentence?

II. When the court of appeals declines to grant a certificate of appealability, does this Court have jurisdiction to review the denial of the COA more than 90 days after the court of appeals' order but less than 90 days after the court of appeals final judgment disposing of the issues upon which a COA was granted?

III. In a capital-sentencing hearing, do the Eighth and Fourteenth Amendments permit state courts to use non-statutory aggravating factors to justify a capital sentence?

IV. In a capital-sentencing hearing, do the Eighth and Fourteenth Amendments permit state courts to consider unadjudicated criminal allegations to justify a capital sentence?

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 271 F.3d 658, and its order granting petitioner's application for a certificate of appealability on two of twelve issues presented (Pet. App. 20a-21a) is unreported. The district court's opinion (Pet. App. 22a-93a) is unreported. The Ohio Supreme Court's opinion (Pet. App. 94a-121a) is reported at 631 N.E.2d 124. The Ohio Court of Appeals' opinion (Pet. App. 122a-155a) and the trial panel's Verdict and Sentence (Pet. App. 156a-157a) and Opinion (Pet. App. 158a-163a) are all unreported.

JURISDICTION

On October 12, 2000, the court of appeals denied petitioner's application for a certificate of appealability on ten of twelve issues asserted. After reviewing the two issues certified for appeal, the court of appeals entered its final judgment on November 14, 2001. The court denied petitioner's motion for rehearing and suggestion for rehearing en banc on March 1, 2002. (Pet. App. 1a.) Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 1254 of Title 28 provides in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Section 2253(c)(1) of Title 28 provides in pertinent part:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

Section 2101(c) of Title 28 provides in pertinent part:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

STATEMENT

This capital case raises three constitutional questions and one jurisdictional question. The constitutional questions all ask in one way or another whether the prosecution and the courts may use the existence of non-statutory aggravating factors to *justify* the imposition of a capital sentence. The jurisdictional question asks whether this Court may review the denial of a certificate of appealability (COA) more than 90 days after the court of appeals' COA order but less than 90 days after it issues a final judgment rejecting the other issues upon which a COA was granted. Each question is of significance not only to Mr. Fox but to most capital defendants, and all four questions warrant this Court's attention and time.

Petitioner Richard Fox grew up in Wood County, Ohio, near Bowling Green. He graduated from Otsego High School,

where he played on the football team. After graduation, Mr. Fox held steady employment and, until his underlying capital conviction in this case, did not have any criminal record. He was well-liked in school, in his community, and at his church. (*See* Pet. App. 97a-100a; 140a-143a; 153a-155a.) He has one daughter.

I. STATE TRIAL COURT PROCEEDINGS

On October 4, 1989, Mr. Fox was indicted in state court on one count of aggravated murder, in violation of Ohio Revised Code § 2903.01, with a death penalty specification of kidnapping, and one count of kidnapping, in violation of Ohio Revised Code § 2905.01. The indictment alleged that Mr. Fox had murdered Leslie Keckler. According to the indictment, Mr. Fox posed as a job interviewer interested in hiring Ms. Keckler for a restaurant supply sales job, asked Ms. Keckler to ride with him while he showed her the sales route, and then, after a heated verbal exchange, strangled Ms. Keckler. A three-judge panel found Mr. Fox guilty of both counts and the specification.

At the penalty phase, the evidence established that Mr. Fox had no previous criminal history. All told, eighteen witnesses, including family members, friends, neighbors, former teachers, and a pastor, testified that Mr. Fox was honest, well-liked, good-natured, a fine father, and a person of sound reputation in the Bowling Green community. Corrections officers who supervised Fox during his pre-trial confinement testified that Fox was a "model prisoner" who, among other things, "helped save the life of a diabetic inmate who went into shock." (Pet. App. 99a.) Nonetheless, the three-judge panel sentenced Fox to death.

II. STATE APPELLATE PROCEEDINGS

A divided court of appeals affirmed. In doing so, however, the majority engaged in its own "reweighing" of the aggravating and mitigating factors in light of the trial panel's failure (under Ohio law) properly to explain why the sole aggravating factor presented by the prosecution outweighed the mitigating factors. (Pet. App. 139a ("We now independently consider whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.").) Judge Sherck dissented from his two colleagues' affirmance of the death sentence, finding error in the sentencing phase and concluding, after his own independent review of the record, that a death sentence for Mr. Fox was not warranted. (*See* Pet. App. 152a-153a ("[T]here appears to be a likelihood that the panel misapplied the statutory balancing of aggravating circumstance and mitigating factors. Unfortunately, we do not know if this was the case because the trial panel erred by failing to articulate its reasoning pursuant to R.C. 2929.03(F). . . . I have . . . conducted my own examination [and] I cannot conclude that the [one] aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.").)

A divided Ohio Supreme Court affirmed. (*See* Pet. App. 112a.) Like the court of appeals, the Ohio Supreme Court concluded that the trial panel violated Ohio law by not explaining its weighing analysis. (*See id.* at 107a ("The trial court's opinion in this case causes us to once again admonish trial courts to carefully comply with every specific statutory requirement in R.C. 2929.03(F).").) Yet the court disagreed that the trial panel impermissibly relied upon nonstatutory aggravating circumstances in sentencing Fox to death. The court held that the "trial court could appropriately refer to the manner in which Fox planned and executed the events that led to the kidnapping and murder." (*Id.* at 109a.) Further, the court found "no error" in the court of appeals' reference to the evidence that "Fox purposely used deception to lure *two*

young women into his control," (Pet. App. 109a (emphasis added)), despite the fact that "Fox was not charged with any offense against [Marla] Ritchey," the other woman Mr. Fox allegedly had attempted to deceive many months earlier. (*Id.*) According to the Ohio Supreme Court, the "facts of the Ritchey incident were interwoven with the facts and circumstances of the Keckler kidnapping murder." (*Id.*)

In light of the trial court's failure to explain its statutory weighing process, the Ohio Supreme Court attempted to conduct its own "independent reassessment," after which it concluded that the one aggravating factor outweighed the mitigation evidence. On the aggravating side, the court relied upon the planning and violence that accompanied Fox's offense. (*See* Pet. App. 110a-111a.) While recognizing the considerable amount of mitigation evidence, including Fox's steady employment, favorable character testimony, his lack of a prior criminal history, and the fact that he suffered from a mental disorder, the court accorded the evidence "only modest weight in light of all the other circumstances." (Pet. App. 112a.) The court then proceeded to stress that "Fox faced few challenges and little adversity in his life compared with many others" and that "[a]lthough Fox's mental disorder may be a mitigating 'other factor,' such a disorder tends to undercut any prospect of successful rehabilitation." (*Id.*) In a vigorous dissent, Justices Sweeney and Wright professed astonishment at the majority's decision to allow mitigating evidence to be weighed *against* Mr. Fox's quest for life in prison over death. (*See* Pet. App. 120a ("Are we to presume that the trial panel would have more seriously considered mercy if [Mr. Fox] had voluntarily been a burden to society all of his life?" (Sweeney and Wright, JJ., dissenting).)

In his subsequent petition for review to this Court, Mr. Fox again questioned whether the Ohio Supreme Court's independent reweighing of the one statutory aggravating factor against the plentiful mitigating evidence cured the trial panel's

error in failing properly to explain why it imposed a death sentence on Mr. Fox.

III. FEDERAL HABEAS PROCEEDINGS.

After this Court declined direct review, Mr. Fox unsuccessfully pursued collateral relief in the state courts. (*See* Pet. App. 28a.) Fox next sought collateral relief in federal court. Chief among his grounds for relief were the state courts' conversion of mitigating evidence into aggravating evidence, their use of nonstatutory aggravating circumstances, their misuse of an uncharged criminal allegation, and the trial panel's failure adequately to consider mitigating factors and to explain its analysis fully in accordance with Ohio Revised Code § 2929.04(B). (*See* Pet. App. 29a-33a.) The district court denied his petition for a writ of habeas corpus, holding that the trial court had not considered extra-statutory aggravating circumstances during the penalty phase, and, in any event, that the Ohio Supreme Court's independent reweighing cured any infirmity in the trial court proceedings, including any error in considering mitigating evidence on the aggravating side of the scale. (*See* Pet. App. 53a-57a; 60a-62a; 65a-69a.) Before Mr. Fox was given a chance to file a COA under 28 U.S.C. § 2253(c), the district court *sua sponte* ruled that "an appeal could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability." (*Id.* at 93a.)

Having been denied his first opportunity to seek a COA, he next sought a COA from the Sixth Circuit on a variety of issues, including whether the state courts permissibly relied on statutorily-prescribed mitigating evidence to *justify* a capital sentence. On October 12, 2000, the Sixth Circuit denied Mr. Fox's request for a COA on the mitigating-evidence claim. But it agreed to consider "(i) whether the Ohio courts erred in using a separate alleged crime for which Fox was not tried as an aggravating factor; and (ii) whether the Ohio courts

erred in using the violence and planning of the crime as aggravating factors." (Pet. App. 20a.)

The appeals court rejected Mr. Fox's arguments on both claims and ultimately affirmed the district court's judgment. In doing so, it held that the Ohio Supreme Court, in independently reviewing the aggravating and mitigating evidence, "did not consider a[n] [aggravating] factor outside the strict limits of Ohio's statutory death penalty framework" and therefore did not violate Mr. Fox's Due Process and Eighth Amendment rights. (Pet. App. 18a.) In reviewing the appellate reweighing process, the Sixth Circuit determined that the "Ohio Supreme Court thus not only approved of the Ohio Court of Appeals' reference to the planning and violence of the crime but also relied upon those same factors in concluding that the aggravating circumstance outweighed the mitigating evidence presented by Fox." (*Id.* at 16a.) In its next breath, however, the court held that "[t]he planning and violence of the crime were neither weighed against the mitigating evidence nor used as aggravating circumstances." (*Id.* at 18a.) On the basis of this latter conclusion, the court denied the writ.

REASONS FOR GRANTING THE WRIT

In affirming Mr. Fox's death sentence, the Ohio Supreme Court and, in turn, the Sixth Circuit failed to adhere to the constitutional circumscriptions for imposing the death penalty. The Eighth Amendment and the Fourteenth Amendment Due Process Clause, this Court has made clear, require state courts independently to reweigh aggravating and mitigating circumstances without reference to an extra-statutory factor and without unfairly tilting the scale in favor of death. *See Richmond v. Lewis*, 506 U.S. 40, 49 (1992) ("where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court . . . must actually perform a new sentencing calculus, if the sentence is to stand."); *Stringer v. Black*, 503 U.S. 222,

232 (1992) ("a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"); *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (holding that a state appellate court "must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error").

The lower courts failed to live up to these requirements in at least three respects. First, and most conspicuously, the Sixth Circuit refused to address Mr. Fox's claim that the state courts erred in allowing statutory mitigating evidence to serve as aggravating evidence. In explaining why Mr. Fox's offense warranted a death sentence, the Ohio Supreme Court weighed *against* Mr. Fox the facts that he suffered from a personality disorder and was otherwise a reputable person with no prior criminal history. The court, for instance, believed that one reason Fox deserved to die was because his mental disorder "tends to undercut any prospect of successful rehabilitation." (Pet. App. 112a.) This approach not only offended Ohio law, which requires mitigation evidence to be weighed against aggravating evidence, *see* Ohio Rev. Code § 2929.04(B), but it also violated the federal Constitution. Neither Due Process nor the Eighth Amendment permits state courts to transform mitigating evidence into aggravating evidence and above all does not permit them to do so in violation of a State's statutory weighing requirements. *See Richmond v. Lewis*, 506 U.S. 40 (1992) (invalidating death sentence because of insufficient appellate reweighing); *Barclay v. Florida,* 463 U.S. 939, 957-58 (1983) (holding that "errors of state law" may be considered where they rise "to the level of a denial of rights protected by the United States Constitution"). Under these circumstances, the Sixth Circuit at a minimum should have granted Mr. Fox a COA on this issue.

Second, the Sixth Circuit relied upon an Ohio Supreme Court decision that has since been modified. Below, Mr. Fox claimed that the Ohio Supreme Court's independent

reweighing of the aggravating and mitigating evidence offended the Eighth Amendment and the Due Process Clause. Citing *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995), the Sixth Circuit rejected the argument and held that the Ohio Supreme Court "did not consider a factor outside the strict limits of Ohio's statutory death penalty framework" in permitting the "planning and violence" that accompanied Fox's crime to weigh in the sentencing decision. (Pet. App. 18a.) But *Gumm* is no longer good law. In *State v. Wogenstahl*, 662 N.E.2d 311 (Ohio 1996), the Ohio Supreme Court "modif[ied] *Gumm*" and declared, contrary to what occurred here, that "the nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation." *Id.* at 322. Measured by the teachings of *Wogenstahl*, the Ohio Supreme Court's independent reweighing was insufficient to avoid an "inherently unreliable" or "arbitrary imposition of the death sentence." *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990); *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Third, the lower courts erred in permitting the Ohio courts to rely on an unadjudicated crime as an aggravating circumstance in determining whether to sentence Mr. Fox to death. This component of the decision not only relies on a non-statutory aggravating circumstance but also violates Due Process in its own right—as several lower courts have held.

These errors in some instances conflict with decisions of this Court, in other instances create a lower-court conflict of authority, and in all instances arise in the irreversible setting of capital punishment. They accordingly warrant full review for these reasons alone.

At the same time, the Sixth Circuit's denial of a COA on the issue of the state courts' use of mitigating evidence as an aggravating factor raises the independent question whether the Court has jurisdiction to grant a COA *after* a court of appeals' decision on the merits and more than 90 days after the COA was denied. While *Hohn v. United States*, 524 U.S. 236

(1998), establishes that this Court may review an issue on the merits under section 1254 when a COA is denied in all respects, it does not answer the follow-up question whether the Court may take the lesser step of granting a COA after a court of appeals' decision on other merits issues. As in *Hohn*, this independent issue deserves review. And because the issue necessarily is one that will not generate a lower-court conflict and because it will facilitate informed, thorough and efficient review of capital cases, among others, the question warrants review now rather than later.

I. THE SIXTH CIRCUIT SHOULD HAVE GRANTED A COA TO DETERMINE WHETHER THE STATE COURTS IMPERMISSIBLY TRANSFORMED MITIGATING EVIDENCE INTO AGGRAVATING EVIDENCE.

A. The Decision Conflicts With Supreme Court Precedent.

The Sixth Circuit altogether failed to address a critical error committed by the Ohio Supreme Court in its independent reweighing: Namely, the conversion of statutory mitigating evidence into non-statutory aggravating evidence. In no uncertain terms, the Ohio Supreme Court reasoned that a death sentence was warranted here because "Fox faced few challenges and little adversity in his life compared with many others." (Pet. App. 112a.) Fox's mental disorder, the court then added, also "undercut[s] any prospect of successful rehabilitation." (*Id.*) This approach is pathbreaking in the law. Never before, to petitioner's knowledge, has a state court considered evidence that the legislature said must be used in a capital defendant's favor, then reasoned that it could be used as an aggravating factor to justify a death sentence.

This unique approach is wrong on any number of fronts. To start, the court ignored the state legislature's directive that "the court, trial jury, or panel of three judges shall consider,

and *weigh against the aggravating circumstances*, proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following [mitigating] factors." (Pet. App. 110a-112a.) *See* Ohio Rev. Code § 2929.04(B) (emphasis added) (listing other mitigating factors).

It is difficult to imagine any reading of the Ohio Supreme Court's opinion by which it could be said to have complied with this mandate. The court unquestionably used mitigating evidence, not to "militate in favor of a lesser penalty [than death]," *Zant v. Stephens*, 462 U.S. 862, 885 (1983), but to justify a decision to end Mr. Fox's life. That analysis represents a nullification of state law, pure and simple.

Nor may the error be confined to state law or left to elected state-court judges to correct. This inversion of the State's capital-sentencing law violates National first principles embodied in the Eighth and Fourteenth Amendments. The weighing process demanded by Ohio law, all agree, is of constitutional dimension. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) ("[A] State must 'narrow the class of murderers subject to capital punishment,' *Gregg v. Georgia*, 428 U.S. 153, 196 (1980), by providing specific and detailed guidance to the sentencer."). By weighing statutorily-defined mitigating evidence against statutorily-defined aggravating evidence, the State fulfills its Eighth (and Fourteenth) Amendment obligation to channel and guide the decisionmaker's capital-sentencing selection process for those eligible for a death sentence. And by failing to adhere to these statutory requirements, a State necessarily abridges a capital defendant's constitutional rights. *See Stringer*, 503 U.S. at 236, 243 (employment of invalid factors in the weighing process "creates the possibility . . . of randomness" by placing a "thumb [on] death's side of the scale," and thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty"). These constitutional safeguards are not satisfied where, as here, a state court ignores statutory

directives and places factors on whatever side of the constitutional life-or-death scale it chooses.

Finally, in leaving the safe harbor of honoring a state legislature's assessment of the appropriate mitigating and aggravating factors, the Ohio Supreme Court premised its notions about the propriety of a death sentence in this instance on pure conjecture and on assumptions directly contradicted by record evidence. The court's suggestion that Mr. Fox had no chance at "successful rehabilitation," for instance, rests upon the assumption that he may one day return to civilian life in Bowling Green. He will not. In choosing to sentence Mr. Fox to death, the trial court rejected the most likely alternative available—life imprisonment without parole. *See, e.g.*, Ohio Rev. Code § 2929.03(C)(2)(a). And as for Mr. Fox's prospects in prison, the only evidence before the trial court indicated that he would be a model inmate and confirmed that he was precisely the type of individual who would undergo the kind of secular or spiritual redemption that makes imposition of a capital sentence terminally disquieting. State officials testified that Fox, during his pre-trial confinement, was a model inmate who both helped to set up a library and who "helped save the life of a diabetic inmate who went into shock." (Pet. App. 99a.) Nonetheless, the Ohio Supreme Court used Mr. Fox's mental disorder and other "mitigating" evidence to suggest rehabilitation was beyond the pale and, therefore, that death was the only answer. *See Clemens*, 494 U.S. at 752 (vacating and remanding where Court could not "be sure that the [Mississippi Supreme] court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence"). In the final analysis, the Ohio Supreme Court's approach to this issue has no legitimate pedigree and for that reason alone the Sixth Circuit should have granted a COA on the issue.

B. The Decision Conflicts With Several Lower-Court Rulings.

In contrast to the approach adopted by the Ohio Supreme Court, blessed by the district court, and not reviewed by the Sixth Circuit, other courts of appeal require that mitigating evidence be weighed *in favor* of the petitioner and *against* the aggravating circumstance. The Tenth Circuit, for example, recently found an Eighth Amendment violation where there was "a reasonable likelihood the jury applied the instructions in a way that prevented it from considering the mitigating evidence" in the petitioner's favor, noting that "the jury must have a means to consider and give effect to the mitigating evidence." *Rojem v. Gibson*, 245 F.3d 1130, 1137-38 (10th Cir. 2001) (holding that "the trial court deprived [petitioner] of his legitimate expectation under state law—he did not receive the assurance the death penalty would be imposed only if the aggravating circumstances outweighed the mitigating circumstance").

The Fifth and Ninth Circuits have ruled similarly. *See, e.g., Adamson v. Ricketts*, 865 F.2d 1011, 1040 (9th Cir. 1988) (holding that Arizona statute "violates the Eighth and Fourteenth Amendments in that Arizona courts are precluded from considering all pertinent mitigating evidence when determining the appropriate penalty"); *id.* ("[I]t is well established that the Constitution requires the weighing of all relevant mitigating evidence against aggravating circumstances."); *Williams v. Cain*, 125 F.3d 269, 282 (5th Cir. 1997) (In a weighing state, the sentencer must "place the statutory aggravating factors on one side of the scale and all of the mitigating evidence on the other, and . . . balance one side against the other before imposing the death penalty."); *id.* (A "weighing state requires the jury to focus only on the *statutory* aggravating factors that it finds, and place only those statutory aggravators on the scale. The weighing state jury is then required to balance these aggravating factors *against* all mitigating evidence, and it can only impose the death penalty

if it determines that the established aggravating factors 'outweigh' the mitigating evidence.").

All told, the Ohio Supreme Court's decision to convert mitigating evidence into aggravating evidence, which the Sixth Circuit conspicuously left in place, conflicts with overwhelming authority to the contrary both from this Court and other courts of appeal. The decision should be reviewed on the merits by this Court or, at a minimum, this Court should review and reverse the order of the Sixth Circuit denying Mr. Fox a COA on this issue. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that for COA to issue, "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong").

II. THE COURT SHOULD DETERMINE WHETHER IT HAS JURISDICTION TO REVIEW THE PARTIAL DENIAL OF A COA.

The Ohio Supreme Court's conversion of mitigating evidence into an aggravating factor arises in an unusual posture that merits additional consideration and potentially different treatment from the other claims Mr. Fox raises. Because both federal courts denied Mr. Fox a COA on this point—the district court *sua sponte* before a COA was even filed and the court of appeals after a COA was filed—no federal court of appeals' decision exists on this issue. This procedural setting thus raises the following question: Do the pertinent federal statutes regarding the jurisdiction of this Court permit it review the partial denial of a COA more than 90 days after the court of appeals' COA order but less than 90 days after the court of appeals' final judgment in the case?

Hohn v. United States, 524 U.S. 236 (1998), supplies a helpful backdrop to the question. There, the Court addressed whether, after the across-the-board denial of a COA by a court of appeals, an inmate nonetheless could invoke the Court's statutory certiorari jurisdiction. *See* 28 U.S.C. § 1254 ("*Cases*

in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari.") (emphasis added). Notwithstanding the court of appeals' gatekeeping decision to deny the COA in its entirety, the Court concluded that such matters still were "cases" that were "in" the court of appeals for purposes of section 1254. *Hohn*, 524 U.S. 236, 241 (1998) ("There can be little doubt that Hohn's application for a [COA] constitutes a case under § 1254(1)."). The Court therefore permitted the inmate in that case to obtain review of the order denying his COA.

After *Hohn*, it thus is clear that inmates may seek review of a denied COA order under section 1254, and may do so within 90 days of that order. *See, e.g., Weeks v. Angelone*, 528 U.S. 225, 231 (2000) ("The District Court denied petitioner's request for federal habeas relief, and the Court of Appeals for the Fourth Circuit denied a certificate of appealability and dismissed his petition. . . . We granted certiorari . . . and now affirm."); *Miller-El v. Cockrell*, 122 S. Ct. 1202 (Mar. 4, 2002) (granting petition to consider whether "the Court of Appeals err[ed] in denying a certificate of appealability and in evaluating petitioner's claim under *Batson v. Kentucky*?").

This case, however, presents a slightly different question. Does the Court have jurisdiction to grant a COA more than 90 days after the court of appeals' order denying it but less than 90 days after the court of appeals issues a decision on the questions for which review was granted? *Hohn* does not answer this question because it involved a case in which the court of appeals denied the COA in its entirety and because it involved a case in which the certiorari petition was filed within 90 days of the order. Nor do the relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") or this Court's jurisdictional statutes clarify the answer to this jurisdictional question.

The relevant provision of the AEDPA, for example, does not contain any time limit. It says:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

28 U.S.C. § 2253(c). By its terms, this provision would seem to allow a litigant like Mr. Fox to seek a COA from this Court or seek certiorari review of a partially-denied COA *after* the court of appeals' decision on the merits, as opposed to compelling him to file a certiorari petition or an application to the circuit justice within 90 days of the partial COA denial. But the answer is by no means clear.

Section 2101(c) of Title 28 contains the 90-day rule, and it too does not directly answer the question. In pertinent part, it provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

This language also is equivocal.

On the one hand, the requirement that a writ must be brought within 90 days of a "judgment or decree" suggests that Mr. Fox should have filed a certiorari petition within 90 days of the partial denial of his COA. *See Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994) ("the 90-day limit is mandatory and jurisdictional") (internal quotation and citation omitted). A "decree," to start with, typically means a court "order," and therefore presumably includes a COA order finally disposing of a habeas claim. *See* Black's Law Dictionary 419 (7th ed. 1999) ("[a]ny court order"); Webster's Third New Int'l Dictionary 588 (1976) ("an order set forth by one having authority"). And, in view of the structure of this sentence, a decree must

refer to an order other than a "judgment" in order to avoid surplusage and to give "decree" independent meaning. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."). On this reading, an order partially and finally denying a COA would seem to be a decree for which review must be sought within 90 days of its entry.

On the other hand, this provision was written against the backdrop of a tradition of incorporating all orders into the final judgment, thereby permitting litigants like Mr. Fox to bring his challenge to all prior court of appeals' orders (including the partial denial of his COA) 90 days after the final judgment in the case. That of course is exactly what he did here. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) ("we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals"); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) ("it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal"). *But see Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923) (in the case of "a final decree," the Court is "expressly denied power to review it after three months"); *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952) ("Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew.").

Lastly, the statute governing certiorari petitions from federal courts of appeals—28 U.S.C. § 1254—does not by itself answer the question. In permitting certiorari petitions addressing "[c]ases in the courts of appeals" and in allowing those petitions to be brought "before or after rendition of

judgment or decree," the provision does not explain what triggers the 90-day rule. And while *Hohn* makes it clear that a complete denial of a COA may be reviewed by the Court through the statutory certiorari process, it does not explain whether the same rule applies to a partial denial of a COA and does not explain when the 90-day window begins and ends in this setting.

Habeas claimants, government defendants and this Court all would benefit from clarifying that litigants like Mr. Fox may obtain independent review of the partial denial of a COA after the court of appeals' decision on the merits and more than 90 days after the order partially denying his COA. For one, this approach will inform the Court's review of these cases and issues and will avoid the filing of potentially-premature COA certiorari petitions. While section 2253 by its terms permits an inmate to seek a COA from a circuit justice before a final judgment and while section 1254 presumably permits an inmate to file a certiorari petition with respect to the partially-denied COA before a final judgment, it will be the rare case when that approach is either efficient or sensible. The court of appeals' review of the issues upon which a COA was granted may well dispose of the entire case, mooting the other questions. And the existence of a court of appeals' decision on the reviewed questions could well assist this Court in determining the significance of the unreviewed issue.

For another, the approach Mr. Fox is recommending would allow the Court to review the denial of the COA, then potentially remand the case back to the court of appeals before considering certiorari review of the other issues presented in the case. That procedure would allow the Court to look at the certworthiness of an issue (or issues) through the lens of a court of appeals' opinion on all of the relevant federal questions.

For still another reason, the irreversible nature of capital punishment favors this approach. This is Mr. Fox's first

federal habeas procedure and could well be his last. Yet here, perhaps the most conspicuous flaw in the state-court proceedings—the conversion of mitigating evidence into aggravating evidence—has been reviewed on the merits briefly by one Article III judge and one such judge alone. In this high-stakes context, it is difficult to believe that Congress wished to compel Mr. Fox either to file a certiorari petition regarding the partially-denied COA before the court of appeals reviewed the merits of his other claims, or forever lose that right altogether. The point of the AEDPA after all was to streamline habeas filings, not to multiply them.

III. THE STATE AND FEDERAL COURTS FAILED TO RESPECT BEDROCK CONSTITUTIONAL LIMITATIONS—REGARDING THE USE OF PERMISSIBLE AGGRAVATING CIRCUMSTANCES—IN REVIEWING AND UPHOLDING Mr. FOX'S CAPITAL SENTENCE.

A. The Ohio Courts Erred In Using The "Planning" and "Violence" Of The Offense As Aggravating Factors.

The Ohio Supreme Court also erred in impermissibly stepping outside the statutory boundaries of Ohio's capital sentencing process when it relied upon other nonstatutory aggravating circumstances. Most notably, the court relied upon the "planning" of the offense, *i.e.*, prior calculation and design, in its independent reassessment. The court stated in relevant part that "considerable effort and planning apparently went into the kidnapping. Fox lured a vulnerable eighteen year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her." (Pet. App. 112a.) Leaving no doubt about its analysis, the Ohio Supreme Court concluded that the trial panel's consideration of the "manner in which [Fox] planned and executed the events that led to the kidnapping and murder" was appropriate. (Pet. App. 109a.) Citing a prior decision of the court, *State v. Stumpf*, 512

N.E.2d 598 (Ohio 1987), the Ohio Supreme Court insisted that sentencing courts are allowed to consider the "nature and circumstance" of the offense in the weighing analysis. (*Id.*)

However, the Ohio Supreme Court's hindsight justification does not withstand scrutiny. At bottom, the "planning" and "violence" of the offense are nonstatutory aggravating circumstances precluded from being considered in the weighing calculus under Ohio law. Indeed, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court reversed a death sentence based on the non-specific aggravating factor that the murder was "outrageously or wantonly vile, horrible and inhuman." *Godfrey*, 446 U.S. at 428-29. ("[A] person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman.") This reasoning applies with equal force to the Ohio Supreme Court's consideration of the non-statutory "violence" of the crime as an aggravating factor. *See Barclay*, 463 U.S. at 956-57 (state court's consideration of improper aggravating circumstance may infect the balancing process and lead to a constitutionally impermissible sentence).

Rather than correcting this constitutional error, the Sixth Circuit compounded it. Looking to Ohio's capital sentencing scheme, the Sixth Circuit took its instruction from *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995), where the Ohio Supreme Court held that "[t]he nature and circumstances of a crime may be 'aggravating' in the sense that they are relevant and tend to reinforce the conclusion that a death sentence should be imposed." *Id.* at 262. But the court erred in relying upon *Gumm*. In *State v. Wogenstahl*, 662 N.E.2d 311 (Ohio 1996), the Ohio Supreme Court embarked "upon a careful review of *Gumm*" and held that "certain errors in the body of that decision [] seemingly cut across the grain of Ohio's death penalty scheme." *Id.* at 321. The Ohio Supreme Court then focused on the same language from *Gumm* that the Sixth Circuit block-quoted in its decision:

> The nature and circumstances of a crime may be "aggravating" in the sense that they are relevant and tend to reinforce the conclusion that a death sentence should be imposed. This does not mean that the facts surrounding a crime can be set forth in the indictment as a specified statutory aggravating circumstance, nor may they be deemed an "aggravating circumstance" in terms of determining death-eligibility. Thus, the fact that a particular murder was, for instance, particularly cruel or heinous is relevant to the determination of the appropriateness of actually imposing a death sentence on a death-eligible perpetrator, even though the fact of cruelty or heinousness would not, of itself, be sufficient to bring the crime within the scope of any section of R.C. 2929.04(A), nor could that fact be used to cause the defendant to become death-eligible.

Id. at 321-22 (quoting *Gumm*, 653 N.E.2d at 262); (*see also* Pet. App. 17a-18a).

The Ohio Supreme Court in *Wogenstahl* recognized "that this language in *Gumm* might be construed to suggest that the nature and circumstances of an offense (such as the cruel and heinous manner in which it was committed) can be included on the aggravation side of the statutory weighing process." *Wogenstahl*, 662 N.E.2d at 322. Yet the court rejected this construction, "modif[ied] *Gumm*," and declared that "the nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation." *Id.* (quoting Ohio Revised Code § 2929.04(B)).

Conspicuously absent from the Sixth Circuit's opinion is any mention of *Wogenstahl*. It instead relies almost exclusively upon *Gumm* to discern Ohio law. At one point, for instance, the appeals court states that it is "entirely permissible under Ohio law for courts to consider the nature and circumstances of an offense in determining whether the aggravating factor(s) outweigh the mitigating circumstances."

(Pet. App. 17a.) Yet at other points the court imparted an altogether different understanding of Ohio law. For instance, it later suggested that nature-and-circumstances evidence may not factor in the weighing process: "Thus, while the nature and circumstances of the crime may be considered, such factors may not be weighed against the mitigating circumstances, nor may they be included among the aggravating circumstances." (Pet. App. 18a.) Despite these different—and seemingly contradictory—understandings of Ohio law, the federal appeals court held that the Ohio Supreme Court, in independently reweighing the aggravating and mitigating evidence, "adhere[d] to the dictates of *Gumm* [because] [t]he planning and violence of the crime were neither weighed against the mitigating evidence nor used as aggravating circumstances." (*Id.*)

The Sixth Circuit's reliance on *Gumm* is incorrect. *Gumm* is not the Ohio Supreme Court's "most recent discussion of th[e] issue [presented in this appeal]." (Pet. App. 17a.) In *Wogenstahl*, the Ohio Supreme Court disavowed *Gumm* because of the confusion it engendered in cases like this one. And the Sixth Circuit's error went beyond a misstatement of Ohio law. It ultimately led to a misreading of the Ohio Supreme Court's decision affirming Mr. Fox's death sentence. The court held that Mr. Fox failed to state a constitutional violation because "[t]he planning and violence of the crime were neither weighed against the mitigating evidence nor used as aggravating circumstances." (Pet. App. 18a.) This conclusion, while perhaps consistent with *Gumm*, is inconsistent with *Wogenstahl* and conflicts with the Ohio Supreme Court's own analysis of the issue. That court afforded Mr. Fox's "steady employment, favorable character testimony, and lack of a prior criminal record . . . only modest weight" because of "all of the other circumstances" surrounding his offense:

> Although Fox kidnapped Keckler by deception, rather than force, considerable effort and planning apparently went into

> that kidnapping. Fox lured a vulnerable eighteen-year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her. Then he deliberately got a rope out of the trunk and strangled her "just to make sure she was dead." After doing this, he dumped her body in a drainage ditch and drove home.

(Pet. App. 16a.)

It is impossible to read this language without concluding that the Ohio Supreme Court impermissibly double counted—using the planning and circumstances of the crime both to establish death-penalty eligibility and to establish aggravating factors at the sentencing hearing. These "other circumstances"—none of which fall within the statutory delineation of aggravating factors—provided reasons to sentence Mr. Fox to death. There is, in short, no question that the Ohio Supreme Court relied upon the planning and violence that accompanied Fox's crime to conclude that the aggravating evidence outweighed the mitigation evidence.

This error was particularly prejudicial in view of the overwhelming amount of mitigation evidence presented during Fox's sentencing. The Ohio Supreme Court's holding thus offended Ohio law, *see Wogenstahl, supra*; risked the arbitrary imposition of the death penalty, *see Clemons*, 494 U.S. at 750; and therefore violated the Eighth Amendment and the Due Process Clause of the U.S. Constitution, *see Stringer*, 503 U.S. at 230-32; *see also Richmond, supra*. The issue deserves review.

B. The Ohio Courts Erred In Using A Separate Alleged Incident For Which Mr. Fox Was Not Tried As An Aggravating Circumstance.

1. The Lower Courts Erred In Considering An Uncharged Crime.

The Ohio state courts next erred by considering the "Ritchey incident" as an aggravating circumstance. At the outset, the Ohio Court of Appeals, in its independent reassessment of Mr. Fox's sentence, examined at length the Ritchey incident: "Fox purposely used deception to lure *two young women* into his control. *When Marla Ritchey realized that she was the victim of a cruel hoax, she was lucky enough to get away from Fox as he grabbed for her.* Leslie Keckler was not so lucky. When she attempted to get away from Fox, he brutally stabbed and strangled her to death and left her body in a rural ditch. *We therefore find that the aggravation circumstance in this case outweighs the mitigating factors beyond a reasonable doubt.*" (Pet. App. 144a (emphasis added).) Mr. Fox, however, was never indicted for kidnapping Ms. Ritchey, much less found guilty of the purported offense beyond a reasonable doubt. The Ritchey incident thus could not qualify as one of the aggravating circumstances enumerated in §§ 2929.04(A)(1) through (8).

On appeal, the Ohio Supreme Court failed satisfactorily to explain the lower courts' reliance on the Ritchey incident:

> We find no error even though Fox was not charged with any offense against Ritchey. The facts of the Ritchey incident were interwoven with the facts and circumstances of the Keckler kidnapping and murder. Moreover, the Ritchey offense was part of Fox's social history and background and reflected upon his character.

(Pet. App. 109a.) This rationalization failed to correct the lower court's error. First, the notion that the Ritchey incident was "interwoven" into the circumstances of the offense not

only was unsupported by the record, this conclusion, were it true, in no way rendered consideration of that evidence any less violative of Mr. Fox's statutory and constitutional rights. The court of appeals had a constitutional duty to disregard that evidence during the sentencing phase, regardless of how that evidence was used during the guilt phase.

Second, the Ohio Supreme Court's attempt to reclassify the Ritchey incident as part of Mr. Fox's social history, background and character is wholly inconsistent with Ohio Revised Code § 2929.04(B), which permits examining this type of evidence only for *mitigation* purposes, not for aggravating purposes as the court did here. Here too, the Ohio Supreme Court eviscerated Ohio's statutory weighing scheme by giving reviewing courts unfettered discretion to inject nonstatutory aggravating circumstances into the weighing calculus under the pretext that such aggravating circumstances were simply part of the offender's background and character. *See Godfrey*, 446 U.S. at 428 (holding that the Eighth Amendment requires "specific and detailed guidance"). The Ohio Supreme Court's consideration of this non-statutory circumstance offended the Constitution by risking the arbitrary imposition of the death penalty. *See Wainwright v. Goode*, 464 U.S. 78 (1983); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

2. The Decision Conflicts With Several State Supreme Court Decisions.

This Court should grant the petition not only to address the Ohio courts' errors in considering Mr. Fox's unadjudicated criminal activity but also to resolve longstanding confusion among state supreme courts over the constitutionality of considering unadjudicated crimes during a capital-sentencing hearing. This division of authority is as deep as it is longstanding.

Several state courts have held that the Due Process Clause and the Eighth Amendment prohibit the consideration of

unadjudicated criminal allegations in imposing a capital sentence. *See, e.g., Tennessee v. Bobo*, 727 S.W.2d 945, 952 (Tenn. 1987) ("to permit the State to present evidence sufficient to convince the jury beyond a reasonable doubt that the defendant had committed murders, for which he has not yet been convicted and before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due process of law"); *Indiana v. McCormick*, 397 N.E.2d 276, 281 (Ind. 1979) ("[B]ecause of the prejudice inherent in the sentencing procedure where the State alleges that the defendant committed another murder, 'regardless of whether he has been convicted of that other murder,' and that other murder is not related to the principal charge, we hold that § 35-50-2-9(b)(8) denies due process as applied to this defendant. U.S. Const. Amend. XIV."); *Provence v. State*, 337 So. 2d 783, 786-87 (Fla. 1976) (holding that language of Florida capital sentencing statute meets federal constitutional requirements as it "excludes the possibility of considering mere arrests or accusations as factors in aggravation"); *see also Cook v. Alabama*, 369 So. 2d 1251, 1257 (Ala. 1978) ("Of course, it could not seriously be contended that evidence could be presented of a prior acquittal even though the defendant had clearly escaped justice on the most technical of technicalities. Consequently, a pending charge cannot be considered either. . . . This fundamental tenet of our system of justice prohibits use against an individual of unproven charges in this life or death situation."); *Pennsylvania v. Hoss*, 283 A.2d 58, 69 (Pa. 1971) ("In a capital case where a man's life is at stake, it is imperative that the death penalty be imposed only on the most reliable evidence. . . . ; piecemeal testimony about other crimes for which appellant has not yet been tried or convicted can never satisfy this standard."). Just last year the Washington Supreme Court reaffirmed that allowing the sentencer in a death penalty case "to consider evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant," and

thereby violates federal constitutional principles. *Washington v. Bartholomew*, 683 P.2d 1079, 1084-86 (Wash. 1984), *rev'd on other grounds*, 516 U.S. 1 (1995); *Washington v. Clark*, 24 P.3d 1006, 1029-30 (Wash. 2001) (declining to overrule *Bartholomew*), *cert. denied*, 122 S. Ct. 475 (2001).

Other state supreme courts, in contrast, explicitly approve of a sentencer's consideration of unadjudicated criminal activity in determining whether to impose a death sentence. *See Kansas v. Kleypas*, 40 P.3d 139, 248 (Kan 2001) (preventing introduction of unadjudicated offenses "in the interest of preventing 'prejudice' to the defendant is neither advisable nor required by the Eighth Amendment."), *petition for cert. filed*, (U.S. May 3, 2002) (No. 01-10105); *Nebraska v. Reeves*, 453 N.W.2d 359, 375 (Neb. 1990) ("it is constitutionally permissible to allow the sentencing judge or judges in a capital case to consider unadjudicated misconduct"), *vacated on other grounds*, 498 U.S. 964 (1990); *California v. Robertson*, 767 P.2d 1109, 1121 (Cal. 1989) ("Defendant contends that admission of prior unadjudicated incidents of criminal activity violates due process. We considered and rejected a similar claim in *People v. Balderas*. . . . Because defendant advances no persuasive reason to reconsider *Balderas*, we adhere to that decision."); *see also Beazley v. Johnson*, 242 F.3d 248, 262 (5th Cir. 2001) ("Fully aware that the due process clause clearly requires that for conviction the state must prove the elements of the offense charged beyond a reasonable doubt, neither we nor the Supreme Court has stated that a similar burden exists regarding the admission of evidence of unadjudicated offenses in a capital case sentencing hearing.") (citation omitted), *cert. denied*, 122 S. Ct. 329 (2001). Lacking a clear resolution of the issue by this Court, many other states continue today to allow sentencers to consider unadjudicated offenses as part of the capital sentencing phase. *See, e.g., Paxton v. Oklahoma*, 867 P.2d 1309, 1323 (Okla. Crim. App. 1993) ("Permitting consideration by the jury of unadjudicated offenses in a case

where the aggravating circumstance of continuing threat is alleged provides further guidance for the jury in their determination whether the defendant's character and criminal propensities justify imposition of the death penalty."); *Crump v. Nevada*, 716 P.2d 1387, 1388-89 (Nev. 1986) (allowing testimony in capital sentencing phase on unrelated homicide for which defendant had not been convicted); *Fair v. Georgia*, 268 S.E.2d 316, 319 (Ga. 1980) ("It is the rule of this state that it is not required that a defendant be convicted of the crime introduced as an aggravating circumstance."); *Milton v. State*, 599 S.W.2d 824, 827 (Tex. Crim. App. 1980) (allowing use of unadjudicated offenses at punishment stage of capital proceeding).

Legal commentators, moreover, have confirmed this deep divide in the state courts. *See, e.g.*, Stephen Paul Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249 (June 1993); *see also* Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. Rev. 1143 (March 1999) (discussing impact of states allowing consideration of unadjudicated offenses on defendants presenting mitigating evidence); Heidi Boghosian, *Distancing Jurors from Death with Death Sentence Evidence*, 5 Temp. Pol. & Civ. Rts. L. Rev. 99 (Fall 1995) (discussing different approaches among various states in their consideration of unadjudicated offenses). Although the Court has yet to resolve this division of authority, the issue has not gone unnoticed. *See Williams v. Lynaugh*, 484 U.S. 935, 937 (1987) (Marshall, J, dissenting from denial of cert. and arguing that "[w]hether a State may introduce evidence of unadjudicated offenses in the sentencing phase of a capital trial is a vexing question with respect to which the state courts are in considerable need of guidance"); *Robertson v. California*, 493 U.S. 879, 879-80 (1989) (Marshall, J, dissenting from denial of certiorari and noting that state supreme courts had not resolved this split of

authority). This case thus presents an appropriate vehicle and an appropriate time for resolving this longstanding disagreement among the state courts.

CONCLUSION

The petition should be granted, or at a minimum a COA should be granted regarding the state courts' improper use of mitigating evidence.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

Richard E. FOX, Petitioner-Appellant,

v.

Ralph COYLE, Warden, Respondent-Appellee.

No. 99-4523.

Argued Aug. 7, 2001.
Decided and Filed Nov. 14, 2001.
Rehearing and Suggestion for Rehearing En Banc Denied March 1, 2002.

Before: NORRIS, SUHRHEINRICH, and MOORE, Circuit Judges.

OPINION

ALAN E. NORRIS, Circuit Judge.

Richard E. Fox ("Fox") appeals from the district court's denial of his petition for a writ of habeas corpus in this Ohio death penalty case. This court granted a certificate of appealability as to two issues: (i) whether the Ohio courts erred by using a separate crime for which Fox was neither charged nor convicted as an aggravating circumstance in imposing the death penalty; and (ii) whether the Ohio courts erroneously considered the violence and planning of the crime as aggravating factors in imposing the death penalty. We now affirm the district court's denial of Fox's petition for a writ of habeas corpus.

I.

The facts underlying Fox's conviction and sentence were set out by the Ohio Supreme Court:

> On September 14, 1989, Leslie Keckler applied for a waitress job at a Bowling Green restaurant. Defendant,

Richard E. ("Dick") Fox, worked there as a grill cook. As Keckler filled out her job application, Fox pointed out Keckler to a coworker and said, "I'd like to have some of that." At Fox's request, the restaurant manager showed Fox the job application, which included Keckler's telephone number.

Sometime after September 14, Keckler told her boyfriend, girlfriend, and mother about an exciting restaurant supply job opportunity. Keckler described the job to her girlfriend and said that she had an interview. According to Keckler's mother, her daughter was very excited about this "sales route" job, which involved selling supplies such as towels and aprons to local area restaurants.

On the evening of September 26, Keckler went to the Holiday Inn where a job interview for the sales route job was to take place. Keckler's boyfriend saw her just before she left. Keckler told him she might be gone for two or three hours while she went over the sales route. When Keckler did not come home that night, her boyfriend and mother filed a missing persons report with police. Police found the car Keckler had been driving abandoned at the Woodland Mall.

On September 30, two boys riding bicycles found Keckler's body in a rural drainage ditch. Keckler was still wearing her new black dress and leather jacket. However, a clasp on her brassiere was broken, her belt was unbuckled, two dress buttons were missing, and her pantyhose were torn in the crotch. Aside from a nearby shoe, police found no other evidence at the scene.

Keckler had died as a result of asphyxia from ligature strangulation and multiple stab wounds. She had been stabbed six times in the back; three stab wounds penetrated her lungs. Her right wrist had a deep gash, and her face had bruises on her left eye, upper lip, and

nose consistent with blunt force injury. The coroner found no signs of sexual molestation.

The evidence at trial later showed that at the hotel, Keckler had met Fox, who later stabbed her six times, strangled her with a rope, dumped her body into a ditch, and then drove home. The facts surrounding Keckler's abduction reminded police of an incident several months earlier involving Marla Ritchey and an unknown man who called himself "Jeff Bennett." In May 1989, Marla Ritchey had applied for a waitress job at a Bowling Green restaurant. Fox then worked at that restaurant. Some days later, arrangements were made for Ritchey to go to the Bowling Green Holiday Inn for an 8:00 p.m. "job interview." At the Holiday Inn, Fox, calling himself Jeff Bennett, told Ritchey that he worked for Great American Foods, and they needed a local sales representative. Ritchey agreed to accompany "Bennett" in his car that evening to discuss the job.

After driving a distance and parking, Bennett (Fox) told Ritchey he thought her dress was too long. Eventually, Ritchey decided this was a "fake interview" and told Fox she was not interested in the job. Fox then asked what Ritchey would do if someone "pulled a knife" on her and asked her for money, or asked her "to do other things." When Ritchey jumped out of the car, Fox tried to grab her and said "come back, that he wasn't finished with [her] yet." Ritchey immediately reported the May incident to the police and helped them prepare a composite police sketch of Bennett.

Because of the similarity between Keckler's abduction and the earlier Ritchey incident, police circulated an updated composite sketch of "Bennett," the man Ritchey had met. Police thought he might be a suspect in Keckler's abduction. On October 2, an acquaintance of Fox told police that this composite sketch resembled

Richard Fox of Tontogany. Police confirmed that Fox matched Ritchey's description of "Bennett," and Fox's car also matched the description of "Bennett's" car.

On October 2, police secured a warrant to search Fox's car and the home where Fox lived with his parents.... [O]fficers conducted the search and found some suspicious items, Fox agreed to go voluntarily to the police station, where he waived his *Miranda* rights and agreed to talk further with police. Before Fox was placed under arrest, he admitted that in early May he had worked at a restaurant where Marla Ritchey had applied for a job, that he met Ritchey at the Holiday Inn, and that he took her for a drive and discussed her skirt length.

Fox also admitted he knew Keckler and claimed they had met and talked at the restaurant where he worked and met again a couple of days later. He described his encounter with Keckler at the Holiday Inn on September 26 as a date. Later, at the mall, "he saw Leslie and they talked and ended up taking a drive in his car."

Fox said that, after driving for a while, he and Keckler parked, and "things were getting warmed up." However, "then Leslie did not want to participate." She called him "an asshole and started to get out of the car." Fox told detectives, "no one calls me an asshole." Then "he grabbed Leslie by the coat as she was standing up to get out of the car and pulled her back in," and he "pulled the coat up over her head." Fox got a knife out of the glove compartment and "stabbed her in the back 4 or 5 times." Then, he "got the rope out of the trunk 'just to make sure she was dead' [and] strangled her." Police terminated the interview when Fox asked for a lawyer.

During the interview, Fox also described another remote rural location. At that location, police subsequently recovered Keckler's purse, her notebook, a letter she had written, her other shoe, a button from her dress, and a

piece of nylon cord. Forensic examination of Fox's car revealed blood on the front passenger seat, door, and window. Samples tested were Keckler's blood type. In Fox's garage, police found a fillet knife and a thin nylon rope; both had blood on them.

A grand jury indicted Fox for kidnapping and aggravated murder with a felony-murder death penalty specification alleging kidnapping. After Fox's motion for a change in venue was overruled by the trial court, Fox waived a jury and tried the case to a three-judge panel.

At the guilt phase, Fox's retained counsel conceded that Fox had killed Keckler but disputed that the evidence established kidnapping. The parties stipulated that Fox had no criminal record. On cross-examination, some witnesses testified to Fox's good character and hard work. Despite his arguments, the three-judge panel convicted Fox as charged.

State v. Fox, 69 Ohio St. 3d 183-85, 631 N.E.2d 124, 125-27 (1994). Following his conviction, the mitigation phase of Fox's trial began before the same panel of judges.[1] After consideration the panel sentenced Fox to death as well as an additional sentence of 10 to 25 years' imprisonment for the kidnapping offense. *State v. Fox,* No. 89-CR-325, Verdict and Sentence at 2-3 (Wood Cty. Ct. June 26, 1990).

Fox's conviction and sentence were affirmed by the Ohio Court of Appeals, *State v. Fox,* No. 90WD0067, 1992 WL 185671 (Ohio Ct. App. Aug. 7, 1992), and the Ohio Supreme Court. *State v. Fox,* 69 Ohio St. 3d 183, 631 N.E.2d 124

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[1] Mitigating evidence included the fact that Fox was a good father to his daughter; a solid member of the community; a reliable employee; and a model inmate while imprisoned awaiting trial. Two defense mental health experts also testified that Fox suffered from a severe personality disorder and that his low self-esteem caused him to adopt a fantasy life.

(1994). Fox sought certiorari from the United States Supreme Court but his petition was denied. *Fox v. Ohio,* 513 U.S. 1060, 115 S. Ct. 671, 130 L. Ed.2d 604 (1994).

Fox then unsuccessfully sought collateral relief from the state courts before filing the present petition for a writ of habeas corpus on May 12, 1998. The district court denied Fox's petition on November 15, 1999, after concluding that the Ohio courts had not considered any extra-statutory aggravating circumstances and that the Ohio Supreme Court's independent reweighing of the aggravating and mitigating circumstances was therefore not contrary to clearly established federal law. *See Fox v. Coyle,* No. 1:97 CV 3301, at 56 (N.D. Ohio Nov. 15, 1999). The district court also denied Fox's request for a certificate of appealability as to all issues. *See id.* at 61. This court, however, granted a certificate of appealability as to two issues: (i) whether the Ohio courts erred in using a separate alleged crime for which Fox was not tried as an aggravating factor; and (ii) whether the Ohio courts erred in using the violence and planning of the crime as aggravating factors. The present appeal followed.

II.

A. *Standard of Review*

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *See Lucas v. O'Dea,* 179 F.3d 412, 416 (6th Cir. 1999). Defendant filed his habeas petition on May 12, 1998, meaning that this court's review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed.2d 481 (1997); *Harpster v. Ohio,* 128 F.3d 322, 326 (6th Cir. 1997). As amended, 28 U.S.C. § 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has explained the effect of § 2254(d)(1) in the following terms:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied-the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but

> unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed.2d 389 (2000). With these standards in mind, we now turn to Fox's claims.

B. *Ohio's Statutory Death Penalty Provisions*

In common with other states that employ the death penalty, Ohio uses a weighing method to determine whether an individual charged with a capital offense receives the death penalty. An individual becomes eligible for the death penalty only if one or more of a series of statutory aggravating circumstances "is specified in the indictment ... and proved beyond a reasonable doubt." Ohio Rev. Code § 2929.04(A). In the present case, Fox was convicted of murder with the capital specification of kidnapping. *See* Ohio Rev. Code § 2929.04(A)(7). Once an individual has been found guilty of a capital offense, a jury or three-judge panel must determine whether the presence of one or more of the nine statutory aggravating circumstances listed at Ohio Revised Code § 2929.04(A) outweighs the mitigating circumstances presented by the defendant. The three-judge panel was thus required to "weigh against the aggravating circumstance[ ] proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors [listing factors such as age, mental disease, and provocation]." Ohio Rev. Code § 2929.04(B).

In weighing the aggravating circumstances against the mitigating factors, the

> court, and the trial jury if the offender was tried by a jury, [1] shall consider ... any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, [2]

> shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and [3] shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.

Ohio Rev. Code § 2929.03(D)(1). Finally, if the court or three-judge panel imposes the sentence of death, it must specify in a separate opinion the aggravating and mitigating circumstances found to be present as well as "the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors." Ohio Rev. Code § 2929.03(F).[1]

C. *Fox's Constitutional Claims*

Fox claims that in the process of weighing the aggravating and mitigating circumstances present in his case the three-judge panel improperly considered the planning and

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[1] Fox makes much of the three judge panel's failure to comply with the dictates of § 2929.03(F), but this was not among the issues this court certified for appeal. Even were the issue before us, it has been definitively decided against Fox, for the Ohio Supreme Court has held that a defendant is not presumptively prejudiced by a trial court's failure to follow the dictates of Ohio Revised Code § 2929.03(F) as independent review at the state appellate level may cure any error. *State v. Maurer,* 15 Ohio St. 3d 239, 246-47, 473 N.E. 2d 768, 777-78 (1984). The United States Supreme Court has endorsed this type of independent review. *See Clemons v. Mississippi,* 494 U.S. 738, 750, 110 S. Ct. 1441, 108 L.Ed.2d 725 (1990) ("We accordingly see nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence.").

violence of the crime. Rather than correcting these errors, Fox further alleges that the state appellate courts compounded them not only by continuing to rely upon the planning and violence of the crime but also by introducing the Ritchey incident into the weighing process. The result, Fox claims, was a constitutionally invalid death sentence.

An examination of the Supreme Court's death penalty jurisprudence indicates that for Fox's claim to succeed he must show that the state courts did consider extra-statutory aggravators; that any errors were not corrected by the state appeals process; and that the consideration of extra-statutory aggravating factors so infected the balancing process as to render the ultimate sentence constitutionally infirm.

i) *Constitutionality of the Consideration of Extra-Statutory Aggravating Factors*

A state wishing to authorize capital punishment "has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed.2d 398 (1980) (quoting *Gregg v. Georgia,* 428 U.S. 153, 196 n. 47, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976)). States may fail to meet their responsibility by relying upon constitutionally invalid aggravating circumstances to define those who are to be sentenced to death. *See, e.g., id.* at 428, 100 S. Ct. 1759 (rejecting the Georgia Supreme Court's affirmance of a sentence of death in a case in which the sole aggravating circumstance was the finding that the offense was "wantonly vile, horrible and inhuman"; such words were insufficient to serve as a restraint on the "arbitrary and capricious infliction of the death sentence"). A defendant's due process rights may also be infringed upon by a state's failure to adhere to its own sentencing statute. *See Hicks v.*

Oklahoma, 447 U.S. 343, 346, 100 S. Ct. 2227, 65 L. Ed.2d 175 (1980) ("Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion....").

The present case involves a state's alleged reliance on sentencing factors that, while constitutionally permissible, could not be considered under the state's statutory sentencing scheme since they were not alleged in the indictment and proved beyond a reasonable doubt.[1] In *Barclay v. Florida,* 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed.2d 1134 (1983), the Supreme Court considered an Eighth Amendment claim regarding a trial court's use of an extra-statutory aggravating factor in a weighing state. The petitioner in *Barclay* was sentenced to death for the random, racially motivated killing of a young hitchhiker. *Id.* at 942, 103 S. Ct. 3418. At sentencing the trial court rejected the jury's recommendation of a sentence of life imprisonment and imposed the death penalty. Amongst the aggravating factors cited by the trial court was the petitioner's criminal record; a factor not listed in the Florida statute governing the aggravating and mitigating circumstances to be considered in the imposition of the death sentence. *Id.* at 944-45, 103 S. Ct. 3418. A plurality of the

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[1] Thus, in this case, it is Ohio's capital punishment scheme that prohibits consideration of the nature and circumstances of the crime as aggravating factors, not the federal constitution. *See Tuilaepa v. California,* 512 U.S. 967, 975-76, 114 S. Ct. 2630, 129 L .Ed.2d 750 (1994) (rejecting the claim that California's use of the nature and circumstances of the crime as an aggravating factor at the sentencing stage was unconstitutionally vague; "our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty").

Supreme Court began its analysis by noting that the "the question whether Barclay's sentence must be vacated depends on the function of the finding of aggravating circumstances under Florida law and on the reason why this aggravating circumstance is invalid." *Id.* at 951, 103 S. Ct. 3418. The Court continued:

> The trial judge's consideration of Barclay's criminal record as an aggravating circumstance was improper as a matter of state law: that record did not fall within the definition of any statutory aggravating circumstance, and Florida law prohibits consideration of nonstatutory aggravating circumstances. In this case, like in *Zant v. Stephens* ... nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record. The trial judge did not consider any constitutionally protected behavior to be an aggravating circumstance....
>
> The crux of the issue, then, is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court [sic] let the sentence stand.
>
> ....
>
> ... [Petitioner's] assertions seem to suggest that the Florida Supreme Court failed to properly apply its own cases in upholding petitioner's death sentence. The obvious answer to this question, as indicated in the previous discussion, is that mere errors of state law are not the concern of this Court ... unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.
>
> In any event, we do not accept Barclay's premise. Cases ... indicate that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical

> fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance.

Id. at 956-58, 103 S. Ct. 3418.

The Supreme Court extended the logic of its *Barclay* decision in *Wainwright v. Goode,* 464 U.S. 78, 104 S. Ct. 378, 78 L. Ed.2d 187 (1983) (per curiam). In *Goode,* the petitioner argued that the trial judge had considered his future dangerousness in sentencing him to death and that reliance on such a factor was impermissible under Florida's capital punishment scheme. *Id.* at 80-82, 104 S. Ct. 378. Unlike in *Barclay,* mitigating evidence had been introduced on behalf of Goode and the trial judge found two mitigating factors to be present. *Id.* at 80, 104 S. Ct. 378. The Florida Supreme Court rejected petitioner's argument on the grounds that the trial judge had not considered future dangerousness in imposing the death sentence. *Id.* at 82, 104 S. Ct. 378. The Eleventh Circuit concluded otherwise and held that reliance on an extra-statutory aggravating factor violated the Eighth and Fourteenth Amendments and rendered petitioner's sentence of death arbitrary. The Supreme Court reversed, finding that the Eleventh Circuit had erred when it had substituted its view of the law and the facts for that of the Florida Supreme Court. The Supreme Court went on to note that even if the state trial court had improperly considered the defendant's future dangerousness,

> there [wa]s no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed

> by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id. at 86-87, 104 S. Ct. 378; *see also Clemons v. Mississippi,* 494 U.S. 738, 746-47, 110 S. Ct. 1441, 108 L. Ed.2d 725 (1990) (jury which had considered an improper aggravating factor imposed the death sentence; Mississippi Supreme Court affirmed on the basis of its own reweighing of the aggravating and mitigating circumstances; Supreme Court concluded that it "must reject Clemons' assertion that he had an unqualified liberty interest under the Due Process Clause to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed").

As *Barclay* and *Goode* make clear, no constitutional claim is stated where a state's highest court either concludes that no extra-statutory factors were considered at the trial level (as in *Goode*) or independently reweighs the aggravating and mitigating circumstances without reference to the extra-statutory factor improperly relied upon by the lower state courts (as in *Barclay*). The critical question in this case is thus whether the Ohio courts considered extra-statutory aggravating factors and, if they did, whether the Ohio Supreme Court cured any error through its own independent re-evaluation of the appropriateness of Fox's death sentence.

ii) *Planning and Violence of the Crime*

In its consideration of the mitigating circumstances present in Fox's case, the three-judge panel "took note of the manner in which [Fox] planned and executed the events that led to the kidnapping and violent murder of the victim." *State v. Fox,* No. 89-CR-325, Op. at 6 (Wood Cty. Ct. July 10, 1990). The Ohio Court of Appeals affirmed the decision of the three-judge panel after independently reweighing the aggravating and mitigating circumstances present in Fox's case. In relevant part, that court stated that:

> We now independently consider whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. The aggravating circumstance Fox was convicted of was committing a murder while committing, attempting, or fleeing immediately after committing or attempting to commit kidnapping. In our review we will consider the nature and circumstances of the offense, the history, character and background of the offender and the mitigating factors pursuant to R.C. 2929.04(B).
>
> ....
>
> Fox purposely used deception to lure two young women into his control. When Marla Ritchey realized that she was the victim of a cruel hoax, she was lucky enough to get away from Fox as he grabbed for her. Leslie Keckler was not so lucky. When she attempted to get away from Fox, he brutally stabbed and strangled her to death and left her body in a rural ditch. We therefore find that the aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt.

Fox, 1992 WL 185671, at *10, *12.

Upon appeal, the Ohio Supreme Court rejected Fox's contention that the three-judge panel and the appellate court had both improperly considered the planning and violence of the crime as aggravating circumstances:

> Nonetheless, the trial court could appropriately refer to the "manner in which [Fox] planned and executed the events" that led to the kidnapping and murder. Kidnapping was the specified statutory aggravating circumstance. Moreover, "[u]nder R.C. 2929.03(F), a ... three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors."

Fox, 69 Ohio St.3d at 193, 631 N.E.2d at 132 (quoting *State v. Stumpf,* 32 Ohio St.3d 95, 512 N.E.2d 598, syllabus para. 1 (1987)). The Court then went on to reweigh the mitigating and aggravating circumstances, concluding that:

> We find nothing in the circumstances of the offense to be mitigating. Under any reasonable interpretation of the evidence, Fox lured Keckler by careful deception into a situation where he could control or dominate her for his own gratification. For whatever reason, he then brutally stabbed and strangled her and callously dumped her body in a ditch.
>
> ....
>
> When the aggravating circumstance is weighed against the mitigating factors, we find the aggravating circumstance of kidnapping outweighs the mitigating factors beyond a reasonable doubt. Although Fox kidnapped Keckler by deception, rather than force, considerable effort and planning apparently went into that kidnapping. Fox lured a vulnerable eighteen-year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her. Then he deliberately got a rope out of the trunk and strangled her "just to make sure she was dead." After doing this, he dumped her body in a drainage ditch and drove home.

Fox, 69 Ohio St. 3d at 194-95, 631 N.E.2d at 133. The Ohio Supreme Court thus not only approved of the Ohio Court of Appeal's reference to the planning and violence of the crime but also relied upon those same factors in concluding that the aggravating circumstance outweighed the mitigating evidence presented by Fox.

The question presently before us is whether this consideration of the planning and violence of the offense took the Ohio courts outside the carefully delineated boundaries of Ohio's statutory capital punishment scheme. This was a

question answered in the negative by the Ohio Supreme Court itself. We find no basis in Ohio law to doubt this conclusion.

Under Ohio law the only aggravating circumstances that may be considered by the courts in sentencing are those delineated in Ohio Revised Code § 2929.04(A). The nature and circumstances of the offense are thus to be weighed against the aggravating circumstances and not as aggravating factors themselves. *See* Ohio Rev. Code § 2929.04(B); *see also State v. Davis,* 38 Ohio St.3d 361, 372, 528 N.E.2d 925, 935-36 (1988) (reversing and remanding when the trial panel considered the "prior calculation and design" of the murder as an aggravating circumstance). It is, however, entirely permissible under Ohio law for courts to consider the nature and circumstances of an offense in determining whether the aggravating factor(s) outweigh the mitigating circumstances. *See State v. Stumpf,* 32 Ohio St.3d 95, 512 N.E.2d 598, syllabus ¶ 1 (1987) ("[u]nder R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors").

In its most recent discussion of this issue, the Ohio Supreme Court explained that

> [t]he nature and circumstances of a crime may be "aggravating" in the sense that they are relevant and tend to reinforce the conclusion that a death sentence should be imposed. This does not mean that the facts surrounding a crime can be set forth in the indictment as a specified statutory aggravating circumstance, nor may they be deemed an "aggravating circumstance" in terms of determining death eligibility. Thus, the fact that a particular murder was, for instance, particularly cruel or heinous is relevant to the determination of the appropriateness of actually imposing a death sentence on a death-eligible perpetrator, even though the fact of

> cruelty or heinousness would not, of itself, be sufficient to bring the crime within the scope of any section of R.C. 2929.04(A), nor could that fact be used to cause the defendant to become death-eligible.

State v. Gumm, 73 Ohio St. 3d 413, 420-21, 653 N.E.2d 253, 262 (1995) (internal citations omitted). Thus, while the nature and circumstances of the crime may be considered, such factors may not be weighed against the mitigating circumstances, nor may they be included among the aggravating circumstances. *Gumm,* 73 Ohio St. 3d at 422, 653 N.E.2d at 263.

The Ohio Supreme Court's consideration of the planning and violence of the crime in the present case adheres to the dictates of *Gumm.* The planning and violence of the crime were neither weighed against the mitigating evidence nor used as aggravating circumstances. Indeed, the Ohio Supreme Court prefaced its discussion by noting that it found "nothing in the circumstances of the offense to be mitigating," thus indicating that the planning and violence of the crime were used to indicate the absence of mitigating factors rather than the presence of aggravating circumstances. The Ohio Supreme Court therefore did not consider a factor outside the strict limits of Ohio's statutory death penalty framework. Under such circumstances no constitutional violation is stated.

iii) *The Ritchey Incident*

The Ohio Supreme Court also rejected Fox's claim that the appellate court had erred when it referenced the Ritchey incident in the process of reweighing the mitigating and aggravating circumstances:

> Fox also argues the court of appeals erred in commenting that "Fox purposely used deception to lure two young women into his control." We find no error even though Fox was not charged with any offense against Ritchey. The facts of the Ritchey incident were interwoven with

> the facts and circumstances of the Keckler kidnapping and murder. Moreover, the Ritchey offense was part of Fox's social history and background and reflected upon his character.

Fox, 69 Ohio St. 3d at 193, 631 N.E.2d at 132. Fox argues that this is an inaccurate characterization of Ohio law. We need not reach this argument, however, as our own careful reading of the Ohio Supreme Court's independent reweighing of the aggravating and mitigating circumstances discloses no reliance on the Ritchey incident. Indeed, the Ohio Supreme Court does not mention the Ritchey incident. *See Fox,* 69 Ohio St.3d at 194-95, 631 N.E.2d at 133-34. The Ohio Supreme Court's independent examination of the aggravating and mitigating circumstances thus cured any error that may have been introduced by the lower state court's reference to the Ritchey incident, *see Clemons,* 494 U.S. at 748-50, 110 S.Ct. 1441, and Fox's claim on this point therefore fails.

III.

The decision of the district court denying Fox's petition for a writ of habeas corpus is affirmed.

 [Filed Oct. 12, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD E. FOX,	)	
	)	**ON APPEAL FROM**
Petitioner-Appellant,	)	**THE UNITED STATES**
	)	**DISTRICT COURT**
v.	)	**FOR THE NORTHERN**
	)	**DISTRICT OF OHIO**
RALPH COYLE,	)	
WARDEN,	)	
	)	**ORDER**
Respondent-Appellee.	)	

BEFORE: NORRIS, SUHRHEINRICH, and MOORE, Circuit Judges.

Petitioner Richard E. Fox has applied to this court for a certificate of appealability pursuant to 28 U.S.C. § 2253. Having considered petitioner's memorandum in support of his application as well as respondent's memorandum in opposition, the court grants petitioner's application as to the following issues:

1. Petitioner's Issue 3(b): "The Ohio courts erred in using a separate alleged crime for which Fox was not tried, let alone found guilty beyond a reasonable doubt, as an aggravating factor."

2. Petitioner's Issue 3(c) and 3(d) combined as the following issue: The Ohio courts erred in using the violence and planning of the crime as aggravating factors.

Furthermore, the parties may address the question of procedural default as it relates to these issues.

To the extent delineated by this order, the application for a certificate of appealability is **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/ Resward Green/a
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard E. Fox,	)	**CASE NO. 1:97 CV 3301**
	)	
Petitioner,	)	**JUDGE PATRICIA**
	)	**A. GAUGHAN**
vs.	)	
	)	
Ralph Coyle, Warden,	)	**Judgment Entry**
	)	
Respondent.	)	

This Court, having issued its Memorandum of Opinion and Order DENYING petitioner's Petition for Writ of Habeas Corpus, hereby dismisses the Petition. Accordingly, the stay of execution is hereby vacated. This action is dismissed. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard E. Fox,	)	**CASE NO. 1:97 CV 3301**
	)	
Petitioner,	)	**JUDGE PATRICIA A. GAUGHAN**
	)	
vs.	)	
	)	
Ralph Coyle, Warden,	)	**Memorandum of Opinion and Order**
	)	
Respondent.	)	

Introduction

This matter is before the Court upon petitioner Richard E. Fox's Petition for Writ of Habeas Corpus (Doc. 12). Petitioner, Richard Fox, acting pursuant to 28 U.S.C. § 2254, filed a Petition for Writ of Habeas Corpus challenging his conviction and sentence of death rendered by an Ohio court. The respondent, Ralph Coyle, Warden, filed a timely Return of Writ, petitioner filed a Traverse and Corrected Traverse and respondent filed a reply to the Corrected Traverse. This case arises out of the murder of a young woman whom petitioner had persuaded to get into his car under the pretenses of a job interview. For the following reasons, the Petition is DENIED.

I. Facts

Factual History

The Ohio Supreme Court set out the following facts[1], as adduced by the evidence presented at trial, upon considering petitioner's direct appeal of his convictions and sentence.

> On September 14, 1989, Leslie Keckler applied for a waitress job at a Bowling Green restaurant. Defendant, Richard E. ("Dick") Fox, worked there as a grill cook. As Keckler filled out her job application, Fox pointed out Keckler to a coworker and said, 'I'd like to have some of that.' At Fox's request, the restaurant manager showed Fox the job application, which included Keckler's telephone number.
>
> Sometime after September 14, Keckler told her boyfriend, girlfriend, and mother about an exciting restaurant supply job opportunity. Keckler described the job to her girlfriend and said that she had an interview. According to Keckler's mother, her daughter was very excited about this 'sales route' job, which involved selling supplies such as towels and aprons to local area restaurants.
>
> On the evening of September 26, Keckler went to the Holiday Inn where a job interview for the sales route job was to take place. Keckler's boyfriend saw her just before she left. Keckler told him she might be gone for two or three hours while she went over the sales route. When Keckler did not come home that night, her boyfriend and mother filed a missing persons report with police. Police found the car Keckler had been driving abandoned at the Woodland Mall.

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[1] As discussed below, petitioner opposes the application of the AEDPA to this case, challenging the presumption of the correctness of state court findings. However, the Court finds, as discussed below, that the AEDPA applies here.

On September 30, two boys riding bicycles found Keckler's body in a rural drainage ditch. Keckler was still wearing her new black dress and leather jacket. However, a clasp on her brassiere was broken, her belt was unbuckled, two dress buttons were missing, and her pantyhose were torn in the crotch. Aside from a nearby shoe, police found no other evidence at the scene.

Keckler had died as a result of asphyxia from ligature strangulation and multiple stab wounds. She had been stabbed six times in the back; three stab wounds penetrated her lungs. Her right wrist had a deep gash, and her face had bruises on her left eye, upper lip and nose consistent with blunt force injury. The coroner found no signs of sexual molestation.

The evidence at trial later shows that at the hotel, Keckler had met Fox, who later stabbed her six times, strangled her with a rope, dumped her body into a ditch, and then drove home. The facts surrounding Keckler's abduction reminded police of an incident several months earlier involving Marla Ritchey and an unknown man who called himself 'Jeff Bennett.' In May 1989, Marla Ritchey had applied for a waitress job at a Bowling Green restaurant. Fox then worked at that restaurant. Some days later, arrangements were made for Ritchey to go to the Bowling Green Holiday Inn for an 8:00 p.m. 'job interview.' At the Holiday Inn, Fox, calling himself Jeff Bennett, told Ritchey that he worked for Great American Foods, and they needed a local sales representative. Ritchey agreed to accompany 'Bennett' in his car that evening to discuss the job.

After driving a distance and parking, Bennett (Fox) told Ritchey he thought her dress was too long. Eventually, Ritchey decided this was a 'fake interview' and told Fox she was not interested in the job. Fox then asked what Ritchey would do if someone 'pulled a knife' on her and

asked her for money, or asked her 'to do other things.' When Ritchey jumped out of the car, Fox tried to grab her and said 'come back, that he wasn't finished with [her] yet.' Ritchey immediately reported the May incident to the police and helped them prepare a composite police sketch of Bennett.

Because of the similarity between Keckler's abduction and the earlier Ritchey incident, police circulated an updated composite sketch of 'Bennett,' the man Ritchey had met. Police thought he might be a suspect in Keckler's abduction. On October 2, an acquaintance of Fox told police that this composite sketch resembled Richard Fox of Tontogany. Police confirmed that Fox matched Ritchey's description of 'Bennett,' and Fox's car also matched the description of 'Bennett's' car.

On October 2, police secured a warrant to search Fox's car and the home where Fox lived with his parents. Then, Detective Sergeant Thomas Brokamp and Investigator John Helm drove there. Fox consented to a police search of the house and his car.

After other officers conducted the search and found some suspicious items, Fox agreed to go voluntarily to the police station, where he waived his *Miranda* rights and agreed to talk further with police. Before Fox was placed under arrest, he admitted that in early May he had worked at a restaurant where Marla Ritchey had applied for a job, that he met Ritchey at the Holiday Inn, and that he took her for a drive and discussed her skirt length.

Fox also admitted he knew Keckler and claimed they had met and talked at the restaurant where he worked and met again a couple of days later. He described his encounter with Keckler at the Holiday Inn on September 26 as a date. Later, at the mall, 'he saw Leslie and they talked and ended up taking a drive in his car.'

> Fox said that, after driving for a while, he and Keckler parked, and 'things were getting warmed up.' However, 'then Leslie did not want to participate.' She called him 'an asshole and started to get out of the car.' Fox told detectives, 'no one calls me an asshole.' Then 'he grabbed Leslie by the coat as she was standing up to get out of the car and pulled her back in,' and he 'pulled the coat up over her head.' Fox got a knife out of the glove compartment and 'stabbed her in the back 4 or 5 times.' Then, he 'got the rope out of the trunk 'just to make sure she was dead' [and] strangled her.' Police terminated the interview when Fox asked for a lawyer.
>
> During the interview, Fox also described another remote rural location. At that location, police subsequently recovered Keckler's purse, her notebook, a letter she had written, her other shoe, a button from her dress, and a piece of nylon cord. Forensic examination of Fox's car revealed blood on the front passenger seat, door, and window. Samples tested were Keckler's blood type. In Fox's garage, police found a fillet knife and a thin nylon rope; both had blood on them.

State v. Fox, 69 Ohio St. 3d 183-185 (1994).

Procedural History

On October 4, 1989, petitioner was indicted in the Wood County Court of Common Pleas on two Counts: one count of aggravated murder in violation of Ohio Revised Code § 2903.01 with a death penalty specification of kidnapping and one count of kidnapping in violation of Ohio Revised Code § 2905.01. (App. to Return of Writ[1] Ex. S).

Petitioner subsequently entered a plea of not guilty to the charges. (App. Ex. AA). Petitioner waived a jury trial and

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1 Hereafter, referred to as "App.".

requested a trial by a panel of three judges. (App. Ex. AQ, AR and AS). On May 3, 1990, the three-judge panel found petitioner guilty of both counts and the specification. (App. Ex. AZ). Following a mitigation hearing which began on June 25, 1990, the three-judge panel sentenced petitioner to death by order of June 26, 1990 with an additional sentence of 10 to 25 years for the kidnapping offense. (App. Ex. BD).

The Ohio Court of Appeals for the Sixth Appellate District affirmed petitioner's conviction and sentence with one judge dissenting as to the sentence of death. (App. Ex. BL). The Ohio Supreme Court affirmed petitioner's conviction and sentence with two justices dissenting as to the sentence of death. (App. Ex. BR). The Ohio Supreme Court subsequently denied petitioner's Motion for Rehearing. (App. Ex. BU). The United States Supreme Court subsequently denied petitioner's Petition for Writ of Certiorari. (App. Ex. BY).

Petitioner filed a post-conviction petition in the Wood County Court of Common Pleas which was denied. (App. Ex. BZ, CE). The Ohio Court of Appeals for the Sixth Appellate District affirmed the dismissal of the petition for post-conviction relief. (App. Ex. CI). Petitioner filed a Memorandum in Support of Jurisdiction in the Supreme Court of Ohio. That Court declined jurisdiction to hear the case and dismissed the appeal. (App. Ex. CJ, CL). The Ohio Supreme Court denied petitioner's Motion for Reconsideration of the order. *State v. Fox*, 685 N.E.2d 547 (Ohio 1997).

Petitioner filed an Application for Reopening in the Ohio Court of Appals for the Sixth Appellate District on the grounds of ineffective assistance of appellate counsel. (App. Ex. CM). The Court of Appeals denied the Application. (App. Ex. CO). The Ohio Supreme Court affirmed that decision. (Respondent's Suppl. to Record Ex. G).

This matter is now before the Court upon petitioner's Petition for Writ of Habeas Corpus.

II. Petitioner's Grounds for Relief

Petitioner sets forth 25 grounds for relief:

1. The prosecuting attorney denied petitioner his rights to due process of law and trial by a fair and impartial jury by engaging in misconduct in violation of petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. Petitioner's waiver of a jury trial was not made voluntarily, intelligently, and knowingly. This violated petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3. The statutory provisions governing the Ohio capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the Supremacy Clause of Article VI of the United States Constitution. This scheme is unconstitutional on its face.

4. The failure of the trial court to appoint a panel composed of active judges violated the petitioner's right to due process and a fair and reliable trial and sentencing determination pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

5. Petitioner was prejudiced by the trial court's failure to find the existence of mitigating factor of Ohio Revised Code § 2929.04(b)(3) which resulted in the failure to properly weigh mitigation against the single aggravating circumstance proved at trial in violation of petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

6. The failure of the trial court to change the venue of the trial denied petitioner his right to due process, equal protection, and effective assistance of counsel under the

Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7. The failure of a three-judge panel to adequately consider mitigating factors and to explain its analysis fully in a written opinion pursuant to Ohio Revised Code § 2929.03(f) constitutes a denial of petitioner's rights of due process and a fair and reliable sentencing determination in violation of petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

8. The admission of excessive, repetitive, cumulative gruesome photographs of the victim prejudices a capital defendant's right to a fair determination of guilt of innocence and penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

9. Petitioner was convicted and sentenced to death under Ohio's unconstitutional statutory definition of "beyond a reasonable doubt" in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

10. The trial court erred to the prejudice of petitioner by combining the Ohio Revised Code § 2929.04(b)(3) mitigating factor with the evidence of appellant's social development which was introduced to establish how the personality disorder evolved and which constitutes a separate mitigating factor under Ohio Revised Code § 2929.04(b)(7) in violation of petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

11. A *de novo* review of the evidence used to establish the single aggravating circumstance proved at trial and the mitigating factors established by the record reveals

that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt.

12. Petitioner was denied the right to the effective assistance of counsel during the trial phase of his case, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

13. Petitioner was denied the right to the effective assistance of counsel during the mitigation phase of his case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

14. The trial court denied petitioner his rights to due process, equal protection, and effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to provide him with a criminalist and a pathologist when these services were reasonably necessary to adequate trial representation and by failing to maintain a complete record of all proceedings thus rendering the record on direct appeal incomplete.

15. Petitioner was denied the right to the effective assistance of counsel on his direct appeals as of right in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

16. The failure of Ohio's appellate courts to reach a unanimous determination during its independent *de novo* review of the appropriateness of petitioner's death sentence, is a violation of the Eighth Amendment of the United States Constitution.

17. Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the failure of Judge Robert V. Franklin and Judge Randall L. Basinger to either

decline appointment or remove themselves from petitioner's case due to their inability to be impartial.

18. The trial court erred to the prejudice of petitioner in failing to suppress his statement to the Bowling Green Police Department in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

19. The aggravating circumstance for which petitioner was convicted merely represented an element of the underlying crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

20. The trial court and appellate courts improperly converted some of petitioner's mitigating evidence into nonstatutory aggravating circumstances in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

21. Both the trial court and the appellate courts conducted an improper proportionality review. Therefore, petitioner's death sentence is disproportionate to the sentences of others in Wood County and to other felony murder convictions with kidnapping specifications in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

22. Petitioner's substantive and procedural due process rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution were violated by the failure of the trial court to specify whether he was guilty of kidnapping for the purpose of terrorizing or inflicting serious physical harm or guilty of kidnapping for the purpose of engaging in sexual activity with the victim against her will.

23. The process of selecting venire persons and grand jury forepersons to serve on grand juries in Wood County

and of presenting evidence to grand juries in Wood County is tainted in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

24. Petitioner was denied his rights to a fair hearing and due process in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the State failed to provide his counsel with exculpatory evidence prior to trial.

25. The cumulative error in petitioner's case makes petitioner's death sentence unreliable, inappropriate and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

III. Discussion

A. Application of the AEDPA

The provisions of section 104 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) served to amend section 28 U.S.C. § 2254. The 1996 amendments to § 2254 apply to petitions filed after the date of the enactment of those amendments. *Warren v. Smith*, 161 F.3d 358 (6th Cir. 1998) ("The Supreme Court in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), clarified that those [AEDPA] changes apply to cases filed after April 24, 1996.")

Petitioner argues that the AEDPA amendments to § 2254, regarding the presumption of correctness of state court fact-findings and deference to state court legal conclusions, should not be applied here as this would constitute an impermissible retroactive application. Petitioner asserts that the application of the amendments would be retroactive because petitioner possessed substantive constitutional rights prior to the enactment of the AEDPA. However, the Sixth Circuit has rejected such a contention.

The AEDPA which "extensively amended" the statutory provisions that regulate federal habeas proceedings became effective on April 24, 1996. *Williams v. Coyle*, 167 F.3d 1036, 1037 (6th Cir. 1999), citing *Lindh v. Murphy*, 521 U.S. 320, 322 (1997). The provisions of the AEDPA do not apply to cases pending when that Act was passed. *Williams*, 167 F.3d at 1037. A federal habeas corpus case is pending for the purposes of *Lindh* and the AEDPA when the petition for writ is filed. *Id.* at 1040, *Fee v. Borgert*, No. 98-1875, 1999 WL 638525 (6th Cir. 1999). Here the Petition was filed on May 12, 1998, after the 1996 effective date of the AEDPA. Therefore, clearly the amendments of the AEDPA, discussed hereafter, apply to this case.

28 U.S.C. § 2254(a) provides that a court "shall entertain an application for a writ of habeas corpus... only on the ground that [the applicant] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e) provides in part:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual

> issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

A petitioner must have exhausted his state remedies before a writ of habeas corpus can be granted. 28 U.S.C. § 2254(b). It is undisputed here that petitioner has exhausted his available state court remedies.

B. Procedural Default

The law of procedural default applies. Pre-AEDPA case law controls on this issue. *Richardson v. Elo*, 974 F.Supp. 1100, 1104 n. 2 (E.D.Mich. 1997). (The substantive changes in the new law have not affected procedural default rules.) Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In the habeas context, this doctrine bars federal review when a state court has declined to address a petitioner's federal claim because of non-compliance with a state procedural requirement. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). "In these cases, the state judgment rests on independent and adequate state procedural grounds." *Coleman*, 501 U.S. at 730. The Supreme Court has announced the standard:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750.

In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit summarized the analytical framework for determination of claims of procedural default. "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-step] analysis." *Id.* at 138. Accordingly,

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule... Second, the court must decide whether the state courts actually enforced the state procedural sanction... Third, the court must decide whether the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim. This question generally will involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims... [Fourth,] [o]nce the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate... that there was 'cause' for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

In addition to "cause and prejudice," procedural default can be excused by a showing that "failure to consider the claim... will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750 ("We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal

law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."), *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of showing of cause for the procedural default.") The Sixth Circuit has made it clear that the "narrow 'fundamental miscarriage of justice' exception is harder to meet [than the cause and prejudice exception.] Any number of Supreme Court cases make clear that the focus of this rare exception is on some showing of actual innocence by the defendant." *Simpson v. Sparkman*, No. 97-6196, 1998 WL 869967 (6th Cir. 1998), citing *Schlup v. Delo*, 513 U.S. 298 (1995), *McCleskey v. Zant*, 499 U.S. 467 (1991), *Smith v. Murray*, 477 U.S. 527 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986) and *Kuhlman v. Wilson*, 477 U.S. 436 (1986). The "burden is on the defendant at this stage to make a 'colorable showing of factual innocence' in order to be entitled to the 'fundamental miscarriage of justice' exception to his procedurally-defaulted claim." *Simpson*, at *3, citing *Kuhlman*, *supra*.

Respondent argues that the following claims for relief have been procedurally defaulted: portions of 1, all of 2, portions of 3 and 4, and all of 6, 8, 12, 13, 14, 15, 17, 18, 19, 22, 23 and 24. Petitioner argues at length that the claims are not defaulted.

In an overabundance of caution and rather than undertake the complex and extensive analysis of Ohio law on the issue of procedural default, this Court will review the Petition on the merits.

C. Analysis of Petition

1. The prosecuting attorney denied petitioner his rights to due process of law and trial by a fair and impartial jury by engaging in misconduct in violation of petitioner's rights under the Fifth, Sixth, Eighth

and Fourteenth Amendments to the United States Constitution.

Petitioner asserts that the prosecutor engaged in misconduct.

First, in response to petitioner's discovery request, the prosecutor placed petitioner's statement admitting the killing in the public records of the Clerk of Courts which was then obtained by the news media and published in detail. The prosecutor indicated to the Judge that he had always filed discovery matters with the Clerk. (Vol I at 59). Petitioner asserts that while applicable criminal rules do not address the procedure regarding the exchange of information between the prosecutor and the defense, American Bar Association standards indicate that such a process is private. Petitioner asserts that this disclosure deprived him of due process and forced him to waive a jury due to the atmosphere which was created in the county in which his trial was to be held.

This claim was raised in petitioner's direct appeal as his fourth assignment of error to the court of appeals. (App. Ex. BI). Although the court of appeals found "error in the method by which the prosecutor responded to discovery," it found the error to be harmless given that the case was tried to a three-judge panel rather than a jury "vulnerable to media influences" and "the record in this case contains overwhelming proof of [petitioner's] guilt." *State v. Fox*, No. 90WD0067, 1992 WL 185671 at *6 (Ohio App. 6th Dist. 1992).

This claim was also raised in petitioner's direct appeal to the Ohio Supreme Court as his fifth proposition of law. (App. Ex. BM). That court reasoned and concluded:

> ... Fox argues that the prosecutor committed egregious misconduct by placing Fox's confession on the public record, thereby causing extensive pretrial publicity. Fox

argues that only a change of venue could have vindicated his fair trial rights.

Following Fox's arrest, his counsel submitted a discovery request to the prosecutor, including a request for copies of any pretrial statements by Fox. The prosecutor promptly responded, and that response included copies of the detective's notes reflecting Fox's oral confession. The prosecutor also filed his discovery response with the clerk of courts, readily making it available to the public.

Following the discovery of Keckler's body and Fox's arrest, newspapers and T.V. stations in Bowling Green and neighboring cities extensively publicized the case, including details of Fox's confession. The trial court rejected Fox's motion for a change of venue. In March, Fox waived his right to a jury trial, and no attempt to seat a jury was ever made.

... We agree with the conclusion of the court of appeals that the prosecutor erred by filing with the clerk of courts the documents requested by defendant's counsel pursuant to Crim.R. 16. The dangers pretrial publicity may present to the constitutional rights to a fair trial are obvious.

However, 'the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L. Ed.2d 78, 87. Accord *State v. Lott* (1990), 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 301.

In this case, Fox received a fair trial before an impartial three-judge panel, and the prosecutor's act in filing the response to the request for discovery did not prejudice Fox. Fox raised no claim here, or at the court of appeals, that the confession was inadmissible. Moreover, judges are presumed in a bench trial to rely only upon relevant, material, and competent evidence. *State v. Davis* (1992),

63 Ohio St. 3d 44, 48, 584 N.E.2d 1192, 1196; *State v. Post* (1987), 32 Ohio St. 3d 380, 384, 513 N.E.2d 754, 759.

'Any decision on changing venue rests largely in the discretion of the trial court. Absent a clear showing of an abuse of discretion, the trial court's decision controls.' *State v. Landrum* (1990), 53 Ohio St. 3d 107, 116, 559 N.E.2d 710, 721-722. See, also, Crim.R. 18; R.C. 2901.12(K); *State v. Spirko* (1991), 59 Ohio St. 3d 1, 23, 570 N.E.2d 229, 253-54. Moreover, the interests of judicial economy, convenience, and reduction of public expenses necessitate that judges make a good faith effort to seat a jury before granting a change in venue. *State v. Warner* (1990), 55 Ohio St. 3d 31, 46, 564 N.E.2d 18, 33; *State v. Herring* (1984), 21 Ohio App. 3d 18, 21 OBR 19, 486 N.E.2d 119. 'It has long been the rule in Ohio that '[t]he examination of jurors on their voir dire affords the best test as to whether prejudice exists in the community * * *.'' *State v. Maurer* (1984), 15 Ohio St. 3d 239, 250-251, 15 OBR 379, 389, 473 N.E.2d 768, 781, quoting *State v. Swiger* (1966), 5 Ohio St. 2d 151, 34 O.O.2d 270, 214 N.E.2d 417, paragraph one of the syllabus.

In this case, Fox's claim that he was 'forced' to waive a jury because of pretrial publicity lacks merit. Because no attempt was made to seat a jury, no proof exists that a fair jury could not have been seated. Even Fox's own expert witness admitted that sixty-two percent of the voters he surveyed in January 1990 said they could put aside any prior knowledge of the case and decide it on the evidence. By the time of trial, in May 1990, the publicity had lessened considerably. Thus, we reject this proposition of law.

State v. Fox, 69 Ohio St. 3d 183, 189 (1994).

Pursuant to 28 U.S.C. § 2254(d), this Court is bound by the Ohio court's legal conclusions unless petitioner establishes

that the conclusion was contrary to established constitutional law or based upon an unreasonable determination of facts presented. Petitioner does not address the preclusive effect of the state court judgment. This Court finds the reasoning and holding with respect to this portion of petitioner's first claim for relief which was adjudicated by the Ohio Supreme Court as set forth above not contrary to clearly established federal law.

Second, petitioner asserts that the prosecutor engaged in the following misconduct. He improperly stated that the petitioner was an extreme security risk and that he should not be permitted to appear in court without handcuffs. He improperly objected to the payment of petitioner's expert witnesses with county funds. He improperly continued to prosecute petitioner's case after being personally involved in the investigation and becoming a witness to contested factual matters. He improperly argued in the penalty phase of petitioner's capital trial that the nature of the crime was a statutory aggravating circumstance which could be considered by the panel in rendering its verdict. Petitioner argues that these acts destroyed the fairness and reliability of the trial. These allegations were not raised on direct appeal.

The relevant inquiry is whether the prosecutor's comments "so infected the trial with unfairness so as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 171 (1986) (citations omitted). In *Lundy v. Campbell*, 888 F.2d 467, 474-475 (6th Cir. 1989) (citations omitted), the Sixth Circuit stated:

> Before habeas relief is granted, the prosecutor's statements must be so egregious as to render the trial fundamentally unfair. This determination is to be made by evaluating the totality of the circumstances surrounding each individual case. Our Court has identified the factors we are to consider in weighing the extent of prosecutorial misconduct in habeas cases.

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Petitioner does not address these factors. This Court's independent analysis has concluded that there has been no prejudice. First, petitioner has not shown how the jury, namely the three-judge panel, was mislead by petitioner's appearance in court with handcuffs. Second, the prosecutor's objection to the payment by the county of petitioner's expert witnesses was unrelated to petitioner receiving a fair trial. Third, the involvement of the prosecutor in the investigation of the case has been rejected herein as a basis of a violation of petitioner's due process rights. Fourth, the prosecutor's argument regarding the nature of the crime as an aggravating circumstance has also been addressed and rejected herein as a constitutional violation. Moreover, petitioner argues that the prosecutor's acts, in conjunction with his conduct in filing the statement, prejudiced petitioner. This Court has already determined that the conduct regarding the filing did not prejudice petitioner. Therefore, this Court concludes that the actions did not deny petitioner due process or inject fundamental unfairness into the trial.

For these reasons, the Court finds that petitioner's first claim for relief is without merit.

> **2. Petitioner's waiver of a jury trial was not made voluntarily, intelligently, and knowingly. This violated petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.**

Petitioner asserts that before he could knowingly and intelligently waive his right to a jury trial, he would need to be made aware of the following factors: the concurrence of three

people rather than twelve would be necessary to convict him of the underlying charges and the death penalty specifications as well as sentencing him to death; he would be giving up his right to a two-stage process before a death sentence could be imposed in which a judge has to make a determination after a jury makes a recommendation; the opportunity for reversal of a conviction and/or death sentence on appeal is greatly diminished in that pre-trial motions regarding the jury issues would be moot, judges are presumed to have ignored inadmissible evidence even if it were deemed admissible at trial and prejudicial evidence is deemed less prejudicial if heard by judges rather than a jury; and the jury waiver may be withdrawn at any time before the trial begins. Petitioner avers that he was unaware of these factors and if he had been aware of them he would not have agreed to be tried by a three-judge panel. (Pet. App. Ex. H).

Petitioner asserts that the trial court did not conduct the necessary inquiry to determine whether petitioner's jury waiver was knowing and intelligent. He also asserts that the waiver was involuntary because he could not receive a fair trial by jury due to the failure to change venue. Finally, petitioner asserts that of the 13 judges who have reviewed his case, the same amount he would have had judge his case in a jury trial, three have voted to overturn his death sentence, thus illustrating the critical nature of his waiver.

Respondent argues that this claim is procedurally barred and fails on the merits as well. Respondent argues that the elements required for a valid jury waiver were present and that this Court should reject petitioner's contentions that his inability to appreciate the legal ramifications of his waiver meant that it was not knowingly and intelligently made inasmuch as this Circuit holds that technical knowledge of the jury trial right is not required for an effective waiver. Nor, respondent asserts, should the Court accept petitioner's contention that because the trial court refused to grant a change of venue, the jury trial waiver was involuntary because

the waiver occurred before any attempt to subject potential jurors to voir dire which, as stated in *State v. Maurer*, 15 Ohio St. 3d 239 (1984), is the best test for determining whether prejudice exists in the community. Moreover, respondent asserts, the trial court had stated in its entry denying the motion to transfer venue, that it would consider a renewed motion to transfer venue after voir dire commenced, but prior to swearing of the jury. (App. Ex. AL).

This claim was not raised on direct appeal (App. BI and BM), but the claim nevertheless fails on the merits for the following reasons.

The requirements for a criminal defendant to validly waive his right to a trial by jury are that (1) the waiver must be in writing, (2) the government attorney must consent to the waiver, (3) the trial court must approve the waiver and (4) the defendant's waiver must be voluntary, knowing and intelligent. *Jackson v. Burt*, No. 95-1270, 1996 WL 599823 (6th Cir. 1996), citing *United States v. Martin*, 704 F.2d 267 (6th Cir. 1983). A habeas petitioner bears the burden of establishing that his jury trial waiver was not voluntary, knowing and intelligent. *Jackson* at *5. The Sixth Circuit has "clarified that a defendant need not have a 'technical knowledge' of the jury right in order for his waiver to be effective." *Id.* Furthermore, "there is no constitutional requirement that a trial court conduct a complex colloquy with a criminal defendant prior to accepting his waiver of his jury trial right." *Id.* citing *Martin*, 704 F.2d at 274. Nor must the trial judge personally interrogate a criminal defendant prior to accepting the jury trial waiver. *Id.*

The record shows that the jury waiver was in writing (App. Ex. AP) and signed by the prosecutor and the court. (*Id.*). The written jury waiver states that it was voluntarily, knowingly and intelligently made. (*Id.*). Furthermore, the record shows that petitioner was questioned by the trial judge regarding the waiver and was asked whether he had the

opportunity to discuss with his counsel the difference between having three judges try the case and having a jury of his peers, whether he had a discussion with counsel as to whether this would be in his own best interest and whether he had given his counsel authority to waive the right to a jury trial. Petitioner responded affirmatively to these questions. (App. Ex. C at 15-16). The waiver was then read into the record and accepted by the court. (*Id.* at 16-20).

Petitioner avers that had he known of the various factors listed above, he would not have waived a jury. However, the Sixth Circuit has held, as discussed above, that a defendant "need not have a 'technical knowledge' of the jury right." Petitioner has also argued that because the court denied him a change of venue, the jury waiver could not have been voluntary. However, as specifically stated by the Ohio Supreme Court with regard to whether only a change of venue could have cured the prosecutor's filing of petitioner's statement, "In this case, Fox's claim that he was 'forced' to waive a jury because of pretrial publicity lacks merit. Because no attempt was made to seat a jury, no proof exists that a fair jury could not have been seated." *Fox*, 69 Ohio St. 3d at 189. Therefore, under the law set forth above, this Court finds that the waiver was valid as the requisites have been met.

For these reasons, the second ground for relief is found to be without merit.

3. The statutory provisions governing the Ohio capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the Supremacy Clause of Article VI of the United States Constitution. This scheme is unconstitutional on its face.

Petitioner asserts six bases in support of the contention that the statutory scheme is unconstitutional.

First, petitioner asserts that the Ohio statutory scheme creates constitutional flaws in the trial proceedings as follows. The statute permits imposition of the death penalty in an arbitrary and discriminatory manner because it gives the prosecutor uncontrolled discretion in indictment decisions. The Ohio statute does not separate proof of aggravating circumstances from proof of guilt which precludes the sentencer from determining whether death is the appropriate punishment. Ohio's scheme fails to comply with *Lowenfield v. Phelps*, 484 U.S. 231 (1988) because it allows an aggravating circumstance merely to repeat an element of aggravated felony murder and the felony murder aggravating circumstances are unconstitutionally vague and imprecise. The statutory scheme imposes an impermissible risk of death on capital defendants who choose to exercise their right to trial, whereas one who pleads guilty or no contest to the indictment may have the capital specification dismissed by the judge.

Second, petitioner asserts that the Ohio statutory scheme creates constitutional flaws in the sentencing proceedings as follows. A mandatory death penalty statute does not have specific standards and the process of deciding who is to be sentenced to death is shielded from judicial mandatory review. The statute does not require the conscious desire to kill, or premeditation and deliberation as the culpable mental state, before the death sentence may be imposed. The statutory scheme requires that a pre-sentence report be submitted to the sentencer once requested by the defendant even if it may then include prejudicial material. The statute does not require the state to prove the absence of mitigating factors and that death is the only appropriate penalty. It is also unconstitutionally vague which can lead to arbitrary imposition of the death penalty and impermissibly devalues the importance of mitigation because no method exists to ensure that a proper "weighing and consideration" is accomplished. The statute's requirement that capital defendants prove the existence of

mitigating factors by a preponderance of the evidence prevents the sentencer from considering relevant mitigating evidence, compels a presumption of death and precludes the sentencer from giving some weight to mitigating evidence which may not satisfy the evidentiary standard. The requirement that the trier of fact not consider sympathy or mercy means that the sentencing decision cannot be based on what the trier of fact may feel after hearing the relevant evidence. There is no system of adequate tracking under the statutory scheme which prohibits adequate appellate review. A sentencer does not have the option of choosing a life sentence unless aggravating factors fail to outweigh mitigating factors, creating a mandatory death penalty. Under the statute, courts affirming a death sentence are required to find that death is the only appropriate remedy which is not a requirement at the original sentencing level although it is a fundamental issue.

Third, petitioner asserts that the Ohio statutory scheme creates constitutional flaws in the appellate proceedings as follows. Because the sentencer recommending life imprisonment is not required to identify mitigating factors, there can be no significant comparison of cases and, thus, no meaningful appellate review. The proportionality system is flawed because it reviews only those cases in which death is imposed. The appropriateness analysis used by the appellate courts is cursory and does not rationally distinguish between those for whom death is an appropriate sanction and those for whom it is not. Further, the state on appeal fails to prove beyond a reasonable doubt that any constitutional error which occurs during the trial did not contribute to the convictions and sentences of defendant.

Fourth, petitioner asserts that societal interests are not served by Ohio's death penalty statutes.

Fifth, petitioner asserts that imposition of the death penalty demonstrates a blatant disregard for the value of human life and entails unnecessary and wanton infliction of

pain and diminishes the dignity of man. Specifically, execution by electrocution is cruel and unusual as evidenced by numerous examples of "botched electrocutions" set out by petitioner. Further, the electrocution procedure utilized causes great pain.

Finally, petitioner asserts that the death penalty statute violates the Constitution's Supremacy Clause which states that judges are bound by the terms of international treaties to which this country is a party. Pursuant to one such treaty, the United States is bound by the terms of the American Declaration of the Rights and Duties of Man under which petitioner may not be subjected to arbitrary deprivation of his right to life, denied equal treatment before the law or receive cruel, infamous or unusual punishment.

This claim asserting the unconstitutionality of Ohio's capital punishment statutory scheme was raised in petitioner's direct appeal as his sixth assignment of error to the court of appeals and as his eighth proposition of law in petitioner's appeal to the Ohio Supreme Court. (App. Exs. BI and BM). These assignments of error incorporate the motion to dismiss the indictment wherein petitioner argued that the capital sentencing scheme is unconstitutional. (App. Ex. AB).

In the motion to dismiss the indictment, wherein petitioner's arguments regarding the constitutionality of the death penalty statute were made, petitioner largely asserted the same challenges he makes here. (App. Ex. AB) With regard to the flaws in the trial proceedings created by the statute, petitioner argued that the statute gives uncontrolled discretion to the prosecutor in indictment decisions (at 23-31); the statute requires proof of aggravating circumstances in the guilt phase (at 60-63); the aggravating circumstances are bound to the underlying aggravated murder (at 64); and defendants who exercise their right to trial are prejudiced (at 85-88). With regard to the flaws in the sentencing proceedings created by the statute, petitioner argued the scheme permits the death

penalty without requiring a conscious desire to kill, premeditation or deliberation as a culpable mental state (at 47-52); the statute does not require the state to prove the absence of mitigating factors and that death is the only appropriate penalty (at 77-80); the statute does not permit consideration of mercy (at 73-77); the statute mandates the death penalty upon proof that aggravating circumstances outweigh mitigation (at 69-72); and the statute fails to require the jury to decide the appropriateness of the death penalty (at 36-39). With regard to flaws in the appellate proceedings created by the statute, petitioner argued the statute fails to assure adequate appellate analysis of excessiveness and disproportionality of death sentences (at 39-45); the statute fails to require triers of fact recommending life imprisonment to identify mitigating factors (at 32-36); and Ohio's proportionality system is unconstitutionally flawed (*Id.*). Petitioner also argued that societal interests are not served by the death penalty statute and that the state does not have a compelling interest in inflicting the death penalty (at 1-10). Finally, petitioner argued that the imposition of the death penalty is cruel and unusual punishment and degrades the dignity of human beings (at 11-22).

The court of appeals briefly concluded:

> ... Fox challenges the constitutionality of Ohio death penalty *** However, the Ohio Supreme Court recently stated '[w]e have repeatedly rejected the arguments raised by counsel and have held the death penalty statute constitutional in all respects.'

State v. Fox, 1992 WL 185671 at *7 (citations omitted). The Ohio Supreme Court in also rejecting this claim, succinctly stated,

> ... Fox challenges the constitutionality of Ohio's death penalty statute. We reject Fox's proposition of law on the authority of *State v. Poindexter* (1988), 36 Ohio St. 3d 1 ... *State v. Jenkins* (1984), 15 Ohio St. 3d 164.

All the arguments as to the constitutionality of Ohio's death penalty scheme which petitioner presents here were before the Ohio courts on direct appeal and, as stated above, those courts rejected the contention of unconstitutionality. Petitioner does not address the preclusive effect of the state court judgment which prohibits this Court from granting relief to petitioner based on a claim which was adjudicated in state court unless petitioner shows the adjudication was contrary to established federal law as interpreted by the United States Supreme Court or involved an unreasonable application thereto. Thus, pursuant to 28 U.S.C. § 2254(d), this Court is bound by the Ohio court's legal conclusions. Furthermore, notwithstanding petitioner's failure to address the preclusive effect, this Court does not find the state court's determination to be contrary to clearly established federal law.

Finally, it appears that plaintiff did not argue on direct appeal that the death penalty statute violates petitioner's rights under the American Declaration of the Rights and Duties of Man. However, the Ohio Supreme Court has properly rejected this contention. *State v. Phillips*, 656 N.E.2d 643, 671 (Ohio 1995).

For these reasons, the third ground for relief is found to be without merit.

4. The failure of the trial court to appoint a panel composed of active judges violated petitioner's right to due process and a fair and reliable trial and sentencing determination pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner asserts that when he waived a jury trial, he requested that active judges be selected to the three-judge panel and Honorable Robert Franklin, a retired judge, was randomly selected. Petitioner asserts that O.R.C. § 2945.06, which sets forth the procedure for selection of a three-judge panel in capital cases, does not provide for selection of a

retired judge and implies that the judges be duly elected and active. Petitioner argues that his due process rights have been violated because he was arbitrarily denied the statutory right to have his case tried only by active judges.

Petitioner raised this claim on direct appeal. (App. Exs. BI and BM, the seventh assignments of error). The Ohio Supreme Court rejected the contention:

> ... Fox argues that a retired judge is ineligible to sit as a panel member in a capital case. Fox contends his conviction and sentence are void since a retired judge sat on his trial panel. However, Fox's proposition lacks any merit.
>
> Section 6(C), Article IV of the Ohio Constitution specifically authorizes the Chief Justice of this court to assign a retired judge, 'with his consent,' to 'active duty as a judge.' In *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St. 3d 28, 30, 6 OBR 50, 52, 451 N.E.2d 225, 228, we upheld the propriety of assignment of retired judges, rejecting the argument that 'the Ohio Constitution requires a trial judge to have been elected and currently serving his term' to sit upon the trial of a case. And in *Pocker v. Brown* (C.A.6, 1987), 819 F.2d 148, a United States Court of Appeals rejected federal constitutional challenges to retired Ohio judges sitting as trial judges.
>
> Additionally, neither the Constitution nor statutory law restricts the type of case to which a retired judge may be assigned. R.C. 2945.06 regulates capital trials before a panel, but the statute neither excludes retired judges from sitting upon such panels nor implies such an exclusion.
>
> Retired judges are as competent as full-time judges to serve as panel members in capital cases. Contrary to Fox's implication, no logic compels a conclusion that judges who must face reelection challenges are more fair to capital defendants than retired jurists. Moreover,

> retired jurists represent a valuable judicial resource when they can sit upon capital panels, thereby helping to minimize unnecessary delay in a time of crowded dockets. See *State ex rel. Keefe v. Eyrich* (1986), 22 Ohio St. 3d 164, 166, 22 OBR 252, 254, 489 N.E.2d 259, 261. Thus, no reasons exist to prohibit a retired jurist from sitting on a three-judge panel in a capital case.

Fox, 69 Ohio St. 3d at 190.

Petitioner argues that *Pocker v. Brown*, cited to by the Ohio Supreme Court, should not apply because petitioner was being tried for a capital crime and, unlike in *Pocker*, the State of Ohio specifically provided by statute the manner in which the judges should be appointed to hear a capital case.

However, the Ohio Supreme Court seemed to specifically address this argument when it stated, "neither the Constitution nor statutory law restricts the type of case to which a retired judge may be assigned. R.C. 2945.06 regulates capital trials before a panel, but the statute neither excludes retired judges from sitting upon such panels nor implies such an exclusion."

Therefore, pursuant to 28 U.S.C. § 2254(d), this Court is bound by the Ohio court's legal conclusion because petitioner does not establish that the conclusion was contrary to established constitutional law or based upon an unreasonable determination of facts presented.

The fourth ground for relief is without merit.

5. Petitioner was prejudiced by the trial court's failure to find the existence of mitigating factor of Ohio Revised Code § 2929.04(B)(3) which resulted in the failure to properly weigh mitigation against the

single aggravating circumstance proved at trial in violation of petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

O.R.C. § 2929.04(B)(3) sets forth as a mitigating factor "whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law." Petitioner argues that the trial court erred in failing to find the existence of this mitigating factor despite the testimony of three experts, Newton Jackson, Thomas Sherman and Barbara McIntyre. Petitioner asserts that these experts came to the same conclusion regarding his personality disorder and that "[t]he only dispute in this testimony is about the legal effect of the defendant's psychological disorder." (Traverse at 105).

Petitioner raised this claim on his direct appeal. (App. Ex. BI at first assignment of error and BM at second proposition of law). The Ohio Supreme Court rejected the claim as follows:

> ... Fox argues that the mitigating factor specified in R.C. 2929.04(B)(3), substantial impairment of capacity, is proved by evidence of a severe 'personality disorder,' such as his narcissistic personality disorder. To qualify for the R.C. 2929.04(B)(3) mitigating factor, a defendant must prove that, because of a 'mental disease or defect,' he 'lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct' to legal requirements.
>
> No expert witness testified that Fox's personality disorder qualified as a 'mental disease or defect' or that it deprived Fox of 'substantial capacity to appreciate the criminality' of what he did or 'conform his conduct' to the law. Dr. Jackson explained that Fox's personality disorder 'is

> not a term which can be brought within the definition of a mental disease or mental defect * * *.' Dr. Sherman, the psychiatrist, asserted it was 'quite clear medically that [Fox] did not suffer from a mental disease or defect which rendered him substantially incapable of appreciating right or wrong or conforming his behaviors' to law. Dr. McIntyre also agreed that Fox's personality disorder did not meet the requirements for that mitigating factor.
>
> Moreover, in other cases, we have recognized that a 'personality' or 'behavior' disorder did not meet the requirements of R.C. 2929.04(B)(3) as a statutory mitigating factor. See *State v. Richey* (1992), 64 Ohio St. 3d 353, 372, 595 N.E.2d 915, 930-931; *State v. Seiber* (1990), 56 Ohio St. 3d 4, 9, 564 N.E.2d 408, 415; *State v. Van Hook* (1988), 39 Ohio St. 3d 256, 262-263, 530 N.E.2d 883, 889-890.

Fox, 69 Ohio St. 3d at 192.

It is therefore petitioner's burden, pursuant to 28 U.S.C. § 2254(d), to show that the Ohio Supreme Court's adjudication of this claim was contrary to clearly established federal law or based upon an unreasonable determination of facts presented.

Petitioner points to Jackson's testimony finding that petitioner had elements of narcissism and grandiosity, his personality disorder caused him to lose control the night of the murder and he had a diminished capacity to control his behavior. Petitioner points to Sherman's testimony finding that petitioner suffered from a narcissistic personality disorder, did not have homicidal intent and committed the crime during a panic reaction. Petitioner points to McIntyre's testimony finding that petitioner suffered from a narcissistic personality disorder, acknowledging that McIntyre also stated that it "does not constitute a mental disease or defect such that it would

prohibit him from appreciating right from wrong and conforming his behavior."

Petitioner asserts that neither Sherman nor McIntyre were asked whether or not the personality disorder substantially interfered with petitioner's volition as compared to a mentally healthy individual despite the fact that the statute provision at issue here does not require proof of either a complete inability to appreciate the criminality of a particular act or a total lack of capacity to conform one's conduct to the requirements of the law but rather only that the offender lacked a substantial capacity to appreciate the criminality of his conduct to the requirements of the law, citing *Van Hook, supra, State v. Dickerson*, 543 N.E.2d 1250, 1254 (Ohio 1989) and *State v. Lawrence*, 541 N.E.2d 451, 457 (Ohio 1989).

Finally, petitioner asserts that an extreme personality disorder is precisely the type of mitigating factor contemplated by O.R.C. § 2929.04(B)(3) and petitioner's capacity to appreciate the criminality of his conduct was substantially diminished by the disorder. Petitioner asserts that the experts opined that petitioner's killing his victim after she rejected the sexual advance of his fantasy persona was a symptom of his narcissistic personality disorder and, therefore, the mitigating factor is present.

For the following reasons, the conclusion of the Ohio Supreme Court will not be disturbed.

As set forth earlier, this mitigating factor requires that "at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law." O.R.C. § 2929.04(B)(3). The record shows that the experts did not determine that this factor had been met. While Jackson testified that petitioner had a diminished capacity to control his behavior due to his mental problem as compared to a normal individual, he stated, "It was a personality disorder

of a very severe nature and as I understand it, that is not a term which can be brought within the definition of a mental disease or mental defect, so he doesn't have that." (App. Ex. N at 294). Sherman's report concludes that petitioner

> appears to suffer from a severe Personality Disorder... It is medically apparent the Mr. Fox is not a psychiatrically normal man. However, it is also quite clear medically that he did not suffer from a mental disease or defect which rendered him substantially incapable of appreciating right or wrong or conforming his behaviors to the requirements of the law. The statute, however, does mention 'other' mitigating factors. This is obviously more ambiguous and the decision regarding his fate under this part of the statute is for Your Honors to make.

(App. Ex. R). McIntyre's report concludes,

> The specific referral question asks only if Mr. Fox suffered from a mental disease or defect which rendered him substantially incapable of appreciating right from wrong or conforming his behavior to the requirements of the law. In the writer's opinion, the answer to this question would have to be 'no.' Even at its most extreme, the type of character pathology seen in Mr. Fox would not encompass that degree of cognitive or volitional incapacity.

(*Id.*).

Thus, this claim for relief is without merit.

6. The failure of the trial court to change the venue of the trial denied petitioner his right to due process, equal protection, and effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner asserts that the trial court erred when it denied his motion for a change of venue. (App. Ex. AL). Petitioner had argued in that motion that he could not receive a fair trial by a jury in Wood County due to the pervasive publicity given the case by the news media as evidenced by front page news stories and "lead-off" stories on television in addition to the prosecutor's filing and the subsequent broadcast of petitioner's confession. (App. Ex. AE). The trial court determined that it did "not find by clear and manifest evidence that pretrial publicity [was] so pervasive and prejudicial." (App. Ex. AL).

Petitioner raised this claim in his direct appeal to the court of appeals as his fifth assignment of error and to the Ohio Supreme Court as part of his prosecutorial misconduct claim in his fifth proposition of law. (App. Exs. BI and BM). On direct appeal, petitioner pointed to some of the exhibits submitted at the change of venue hearing. (App. Ex. BI). The court of appeals determined:

> ... The examination of jurors on voir dire provides the best test of whether adverse pretrial publicity has prevented a defendant from obtaining a fair and impartial jury in the community. *State v. Maurer* (1984), 15 Ohio St. 3d 239, 250-251, citing *State v. Swiger* (1966), 5 Ohio St. 2d 151, paragraph one of the syllabus. A good faith effort should be made to impanel a jury in the absence of a clear and manifest showing by the defense that pretrial publicity has made seating a jury impossible. *State v. Herring* (1984), 21 Ohio App. 3d 18. Ultimately, the decision to change venue rests within the sole discretion of the trial court. *State v. Mills, supra*, at 363-364, citing *State v. Maurer, supra*, and *State v. Fairbanks* (1972), 32 Ohio St. 2d 34, 37.
>
> A two day pre-trial hearing was held on Fox's motion to change venue. The defense submitted numerous local newspaper articles and video tapes of local newscasts on the Fox case. Local media personnel were called to

> testify on their coverage of the case. The defense also presented the testimony of an expert who surveyed Wood County residents on their knowledge of the case. In the end, the trial court denied the motion finding that the pretrial publicity had not been so pervasive and prejudicial as to require a change of venue. The court further stated that a good faith effort should now be made to impanel a jury. However, the court reserved for Fox the following right: "If during voir dire, but prior to the final swearing of the jury, the defendant feels a change of venue is required then he may again move for a change of venue at that time." Approximately one month later on March 2, 1990, Fox waived his right to trial by jury and elected to be tried by a three-judge panel. Consequently, no attempt to seat a jury was ever made.
>
> Although this case received a large amount of pretrial publicity, it must be recognized that 'an important case can be expected to arouse the interest of the public in the vicinity * * *.' *State v. Landrum* (1990), 53 Ohio St. 3d 107, 117; citing *Irvin v. Dowd* (1961), 366 U.S. 717, 722. Based on the foregoing, we agree with the trial court that the publicity was not so pervasive or prejudicial as to require a change of venue before an attempt was made to seat a jury. Accordingly, Fox's fifth assignment of error is found not well-taken.

State v. Fox, 1992 WL 185671 (Ohio App. 6th Dist. 1992) at *6. The Ohio Supreme Court agreed and reasoned and concluded as set forth above by this Court in petitioner's first habeas ground for relief.

While plaintiff reargues in his petition that the trial court's ruling constitutes a gross abuse of discretion and takes issue with the state court's conclusion to the extent that petitioner's failure to attempt to seat a jury prejudiced his challenge to the denial of the change of venue, he does not show that pretrial publicity and other prejudice in the

community was so pervasive and saturated the community so as to make a fair trial virtually impossible.

Therefore, he fails to show, as required by § 2254(d), that the state courts' determinations "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This Court is bound by the Ohio Supreme Court's conclusion on this claim.

For these reasons, the sixth ground for relief is found to be without merit.

7. The failure of a three-judge panel to adequately consider mitigating factors and to explain its analysis fully in a written opinion pursuant to Ohio Revised Code § 2929.03(f) constitutes a denial of petitioner's rights of due process and a fair and reliable sentencing determination in violation of petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

This claim was raised on direct appeal. (App. Exs. BI and BM). The Ohio Supreme Court determined regarding this claim:

> ... Fox argues that the three-judge panel failed to consider mitigating factors and explain why the aggravating circumstance outweighed mitigating factors. Fox relies upon a section of the trial panel's opinion headed, "Why the Aggravating Circumstance is Sufficient to Outweigh The Mitigating Factors." As Fox correctly argues, that section recites only what the panel considered and does not explain why the aggravating circumstance outweighed mitigating factors.
>
> R.C. 2929.03(F) specifies the findings a trial court or three-judge panel must make when imposing a death sentence. Among other requirements, the statute requires 'specific findings' as to 'the reasons why the aggravating

circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.' Fox argues that deficiency was fatal because the panel never answered this 'why' question. The dissent in the court of appeals agrees with Fox.

The trial court's seven-page opinion specified what mitigating factors were unproved or proved and what weight the panel gave to proven mitigating factors. For example, the court described Fox's strong family and religious upbringing as well as his favorable character traits. However, the panel gave this factor 'little weight' because Fox was 'given an environment which should have allowed him to be able to follow the laws of our society.' The court also recognized his 'personality disorders' and 'education and experiences' and stated that it gave 'due weight' to those factors.

The panel correctly identified the aggravating circumstance and did not rely upon nonstatutory aggravating circumstances.

Much of Fox's argument assumes that particular evidence must be given a certain degree of favorable weight. However, '[t]he fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight.' *State v. Steffen* (1987), 31 Ohio St. 3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus. 'In fact, the assessment and weight to be given mitigating evidence are matters for the trial court's determination.' *State v. Lott, supra*, 51 Ohio St. 3d at 171, 555 N.E.2d at 305. See, also, *State v. Stumpf* (1987), 32 Ohio St. 3d 95, 512 N.E.2d 598, at paragraph two of the syllabus.

We have previously held that our independent review of a sentence will cure any flaws in the trial court's opinion. *State v. Maurer, supra*, 15 Ohio St. 3d at 247, 15 OBR at 386, 473 N.E.2d at 778, recognized the importance of a

trial court's reasoning in choosing the death penalty. However, *Maurer* held that such a deficiency in reasoning was not prejudicial because the independent reassessments by the court of appeals and this court purged any such error. *Id.*

In *State v. Lott, supra*, 51 Ohio St. 3d at 170-173, 555 N.E.2d at 304-306, we also found serious deficiencies in the trial panel's death penalty written opinion. However, we held in *Lott* that these errors were 'rectified by this court's careful independent reweighing.' *Id.* at 170, 555 N.E.2d at 304. See, also, *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed.2d 725; *State v. Landrum, supra*, 53 Ohio St. 3d at 124, 559 N.E.2d at 729.

The trial court's opinion in this case causes us to once again admonish trial courts to carefully comply with every specific statutory requirement in R.C. 2929.03(F). As was stated in *Maurer, supra*, 15 Ohio St. 3d at 247, 15 OBR at 386, 473 N.E.2d at 778, '[t]he failure of a trial court to comply with this aspect of R.C. 2929.03(F) disrupts the review procedures enacted by the General Assembly by depriving the defendant and subsequent reviewing courts of the trial court's perceptions as to the weight accorded all relevant circumstances.'

Fox, 69 Ohio St. 3d at 191-192.

Petitioner does not show how the Ohio Supreme Court's adjudication is contrary to clearly established federal law and, therefore, this Court is bound by its conclusion. Furthermore, notwithstanding petitioner's failure to address the preclusive effect, this Court does not find the state court's determination to be contrary to clearly established federal law.

This claim for relief should is found to be without merit.

8. The admission of excessive, repetitive, cumulative gruesome photographs of the victim prejudices a

capital defendant's right to a fair determination of guilt of innocence and penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This issue was not raised on direct appeal. Petitioner argues that the introduction of the gruesome photographs allowed the three-judge panel to decide this case based on emotion rather than weighing the statutory aggravating circumstances and mitigating factors. Petitioner asserts that the admission of the prejudicial and cumulative gruesome photographs rose to the level as to deny him due process.

For the following reasons, this claim is rejected.

State court evidentiary rulings "may not be questioned in a federal habeas proceeding unless they render the trial so fundamentally unfair as to constitute a denial of federal rights." *Logan v. Marshall*, 680 F.2d 1121 (6th Cir. 1982). See also *Gomez v. DeTella*, 127 F.3d 619 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1325 (1998) (the court stated that a claim that pictures should not have been admitted into evidence "depends more on [state] law than on the Constitution of the United States. Evidence wrongly admitted does not support a writ of habeas corpus unless all things considered the trial posed an unacceptably great risk of convicting an innocent person, and the judicial process therefore denied the accused due process of law."). Aside from merely identifying testimony wherein the photographs were admitted into evidence, petitioner does not show how the admission of the photographs resulted in an unfair trial. Furthermore, the case was tried to a three-judge panel and not a jury which, presumably, may be more swayed by photographs.

This ground for relief is without merit.

9. Petitioner was convicted and sentenced to death under Ohio's unconstitutional statutory definition of "beyond a reasonable doubt" in violation of the due

process clause of the Fourteenth Amendments to the United States Constitution.

Petitioner raised this claim on direct appeal as part of his argument regarding the unconstitutionality of Ohio's statutory capital punishment scheme. (App. Exs. BI and BM). As discussed above in petitioner's third ground for relief herein, in his direct appeal petitioner had incorporated his motion to dismiss the indictment which contained his arguments regarding the statute's unconstitutionality. In that motion, petitioner specifically argued that the Ohio "beyond a reasonable doubt" standard of proof is faulty. (App. BJ at 53-60). As discussed above, the Ohio Supreme Court concluded that the statutory scheme is not unconstitutional. Therefore, this claim fails for the reasons set forth in petitioner's third ground for relief.

10. The trial court erred to the prejudice of petitioner by combining the Ohio Revised Code § 2929.04(b)(3) mitigating factor with the evidence of appellant's social development which was introduced to establish how the personality disorder evolved and which constitutes a separate mitigating factor under Ohio Revised Code § 2929.04(b)(7) in violation of petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

This claim was raised on direct appeal as petitioner's second assignment of error to the court of appeals and third proposition of law to the Ohio Supreme Court. (App. Exs. BI and BM). The Ohio Supreme Court rejected the claim as follows:

> ... Fox argues the trial court erred by intermingling the separate evidence of Fox's alleged mental defect, under R.C. 2929.04(B)(3), with evidence of his history and background. However, that proposition lacks any merit

> because Fox never proved the mental-defect mitigating factor at trial. Nonetheless, the trial court did consider evidence of Fox's 'personality disorder' as a relevant 'other factor' under R.C. 2929.04(B)(7).
>
> A decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign a given factor is a matter for the discretion of the individual decisionmaker. See *State v. Mills* (1992), 62 Ohio St. 3d 357, 376, 582 N.E.2d 972, 988. '[E]vidence of an offender's history, background and character ... [not found] to be mitigating, need be given little or no weight against the aggravating circumstances.' *State v. Stumpf, supra*, at paragraph two of the syllabus.

Fox, 69 Ohio St. 3d at 192-193.

Petitioner now details his social development including the following: petitioner's biological father died before his own birth and petitioner was raised by his mother and her family and was spoiled; his mother remarried but petitioner was not adopted until he was a pre-adolescent which resulted in the withdrawal of affection of his paternal grandparents; petitioner was jealous of his two half-sisters who succeeded in school and in life while petitioner was low average; petitioner's father was a strict disciplinarian and petitioner had a deep sense of failure and rejection; and petitioner was unable to forge meaningful relationships with women. Petitioner argues that this history should have been separately considered instead of being "lumped" together with the evidence of his diminished capacity. Petitioner asserts that under United States Supreme Court law a sentencer in a capital case may not refuse to consider any relevant mitigating evidence. The effect of the trial court's combining the factors, petitioner asserts, amounted to a refusal to consider the evidence of the social history. This Court disagrees. As the Ohio Supreme Court determined, the trial court did not refuse to consider this

evidence but chose to do it in its own way which the Ohio Supreme Court properly stated was permissible.

This ground for relief is overruled.

11. A *de novo* review of the evidence used to establish the single aggravating circumstance proved at trial and the mitigating factors established by the record reveals that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt.

This claim was raised on direct appeal as petitioner's third assignment of error to the court of appeals and fourth proposition of law to the Ohio Supreme Court. (App. Exs. BI and BM). This claim was addressed by the Ohio Supreme Court:

> ... Fox argues that, after independent reassessment, we should find the death sentence inappropriate and disproportionate and remand for the imposition of a life sentence. Fox argues that the evidence of kidnapping, or of violence in the kidnapping, is weak and circumstantial; hence, that aggravating circumstance is entitled to minimal weight when weighed against substantial mitigating factors.
>
> However, kidnapping can be by deception, R.C. 2905.01, and we find the evidence proved this aggravating circumstance beyond a reasonable doubt. Simply because the kidnapping involved deception rather than force offers scant reason to minimize this aggravating circumstance. The evidence showed that Fox secured Keckler's phone number and then called her pretending to be a prospective employer. Keckler expressed enthusiasm for her new 'job' to her mother, girlfriend and boyfriend. These facts demonstrate Fox's careful planning of his 'job interview' with Keckler. Additionally, Keckler's body revealed other signs of

struggle; her face was bruised, and her clothing was disarranged.

We find nothing in the circumstances of the offense to be mitigating. Under any reasonable interpretation of the evidence, Fox lured Keckler by careful deception into a situation where he could control or dominate her for his own gratification. For whatever reason, he then brutally stabbed and strangled her and callously dumped her body in a ditch.

In contrast, Fox's history, character, and background do present unusual mitigating features. Numerous witnesses attested to Fox's good character and favorable community reputation. Additionally, Fox's steady, honest employment since high school graduation is relatively unusual among those persons convicted of aggravated murder and sentenced to death. Thus, Fox's history, character and background are entitled to weight in mitigation.

Fox also lacks any prior criminal record; he thus has the benefit of that statutory mitigating factor in R.C. 2929.04(B)(5). Additionally, the support of Fox's family and friends, his love and care of his daughter, his remorse, and his relatively successful adjustment to pretrial confinement in the county jail can all be considered as favorable 'other factors' under R.C. 2929.04(B)(7). Fox's personality disorder is also a mitigating 'other factor.' All of these factors are entitled to some weight.

However, the foregoing exhausts Fox's mitigating factors. Even if Keckler called Fox a name, she did not thereby 'induce' or 'facilitate' the offense within the meaning of R.C. 2929.04(B)(1). Nor was Fox acting 'under duress, coercion, or strong provocation' when he reacted to that name. See *State v. Seiber, supra*, 56 Ohio St. 3d at 8, 564 N.E.2d at 415; *State v. Clark* (1988), 38

Ohio St. 3d 252, 263, 527 N.E.2d 844, 856; R.C. 2929.04(B)(2). As discussed previously, Fox's personality disorder did not qualify as a 'mental disease or defect' under R.C. 2929.04(B)(3). At thirty-three years of age, and as the principal offender, Fox did not meet the mitigating factors in R.C. 2929.04(B)(4) or (B)(6). Although Fox confessed, he did so only after initially denying any involvement, and his confession is entitled to no weight. Aside from those mentioned earlier, there are no other mitigating factors.

When the aggravating circumstance is weighed against the mitigating factors, we find the aggravating circumstance of kidnapping outweighs the mitigating factors beyond a reasonable doubt. Although Fox kidnapped Keckler by deception, rather than force, considerable effort and planning apparently went into that kidnapping. Fox lured a vulnerable eighteen-year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her. Then he deliberately got a rope out of the trunk and strangled her 'just to make sure she was dead.' After doing this, he dumped her body in a drainage ditch and drove home.

Although Fox's steady employment, favorable character testimony, and lack of a prior criminal record are noteworthy, we accord them only modest weight in light of all the other circumstances. Fox faced few challenges and little adversity in his life compared with many others. Although Fox's mental disorder may be a mitigating 'other factor,' such a disorder tends to undercut any prospect of successful rehabilitation. Thus, the aggravating circumstance outweighs mitigating factors, even when the mitigating factors are considered in their entirety.

The death penalty is appropriate, and that penalty is neither excessive nor disproportionate when compared

with the penalty imposed in similar cases of aggravated murder during a kidnapping. See *State v. Seiber, supra; State v. Jells* (1990), 53 Ohio St. 3d 22, 559 N.E.2d 464; *State v. Brewer, supra; State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267.

Fox, 69 Ohio St. 3d at 194-195.

Petitioner argues that all the evidence relating to the aggravating circumstance, the kidnapping, is circumstantial; it was not perpetrated by force, but by deception; and the purpose of the deception, to engage in some form of sexual activity, was not what actually occurred. Petitioner further reargues the mitigating factors including his confession to the crime and his remorse, his lack of a criminal history, the likelihood that he would be a good and productive member of society while incarcerated, his daughter does not want him executed and the fact that one of the experts testified that petitioner had hit "rock bottom" and had no hope for improving his life or his ability to significantly care for his daughter.

However, petitioner fails to show how the Ohio Supreme Court's individual reassessment of petitioner's death sentence was contrary to federal law or not based on a reasonable determination of the facts.

This claim for relief is overruled.

12. Petitioner was denied the right to the effective assistance of counsel in the trial phase of this case, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Generally, "Ineffective assistance of counsel occurs when an attorney's deficient performance prejudices the defense and renders the trial unfair and the result unreliable." *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1526 (1998), citing *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court set forth a two-

pronged test for determining whether counsel's representation was ineffective. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. "To show prejudice, 'the defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Austin*, 126 F.3d at 847-848, citing *Strickland*. This Court's review of defense counsel's performance is highly deferential. *Id.* *Strickland* further stated:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Petitioner argues that counsel was ineffective in the pretrial and innocent/guilt phase of the proceedings. With regard to pretrial preparation, petitioner asserts the following

with respect to his counsel's actions: counsel failed to file a pre-trial motion to suppress suggestive identification lineups, counsel failed to obtain a pathologist to review the autopsy and findings reached by the coroner and conduct his own independent testing, counsel failed to obtain a criminalist to review trace evidence testing conducted by the State's expert and to conduct independent testing, counsel failed to obtain a mitigation specialist, counsel failed to move Judges Robert Franklin and Randall Basinger to recuse themselves, counsel failed to attempt to seat a jury in order to obtain a change of venue or preserve this issue for appeal and counsel advised petitioner to waive his right to a jury trial without advising him of all the relevant circumstances and likely consequences and counsel failed to file a motion to remove the Wood County prosecutor's office given that it participated in the investigation and failed to call the prosecutors as fact witnesses.

With regard to the innocent/guilt phase of the proceedings, petitioner asserts the following with respect to his counsel's actions: counsel failed to object to gruesome photographs submitted by the state, counsel failed to object to the court's failure to specify whether petitioner was guilty of O.R.C. § 2929.04(A)(3) or (4) and counsel failed to object to Ohio's definition of proof beyond a reasonable doubt in O.R.C. § 2901.05 as setting an unconstitutionally low standard.

Petitioner did not raise these claims on direct appeal. (App. Exs. BI and BM). In his Petition to Vacate or Set Aside Judgment And/Or Sentence, petitioner asserted ineffective assistance of counsel at the pretrial and innocent/guilt phase of the proceedings. (App. Ex. BZ, 23rd, 28th, 36th and 38th claims for relief).

For the following reasons, this Court finds that counsel was not ineffective.

Petitioner asserts that counsel failed to file a pre-trial motion to suppress suggestive identification lineups. The Ohio court of appeals dismissed this claim in the appeal of the post-conviction petition because the evidence showed that a man voluntarily walked into the police department and informed officers that the composite drawing of the suspect resembled petitioner. (App. Ex. CI). Petitioner does not show otherwise.

Petitioner asserts that counsel failed to obtain a pathologist and a criminalist. This claim fails for the reasons discussed below in ground 14.

Petitioner asserts that counsel failed to obtain a mitigation specialist. The trial court dismissed this claim in the post-conviction petition finding that the evidence in the form of affidavits and other exhibits filed failed to present a reasonable probability that petitioner's trial would have been different had a mitigation specialist been retained. (App. Ex. CE). Petitioner does not now show otherwise.

Petitioner asserts that counsel failed to move Judges Robert Franklin and Randall Basinger to recuse themselves. This claim fails for the reasons stated in claim 17 below.

Petitioner asserts that counsel failed to attempt to seat a jury in order to obtain a change of venue or preserve this issue for appeal and counsel advised petitioner to waive his right to a jury trial without advising him of all the relevant circumstances and likely consequences. This claim fails for the reasons stated in claim two above.

Petitioner asserts that counsel failed to file a motion to remove the Wood County prosecutor's office given that it participated in the investigation and failed to call the prosecutors as fact witnesses. Petitioner points to the record wherein it is established that the prosecutors were present at the time petitioner was questioned, arrested and his vehicle and residence searched. Petitioner argues that counsel's

conduct in this regard deprived him the opportunity to present crucial evidence on his behalf. However, he does not state what evidence this may be. Moreover, respondent argues, and this Court agrees, that because the police officers who were also present did testify at trial, counsel's decision not to present cumulative damaging evidence was a tactical decision not rebutted by petitioner. Additionally, petitioner argues that the Wood County prosecutors' direct involvement caused them to have an interest in seeking a conviction and death sentence at all cost rather than handling the case in the uniform manner of all cases in the County. This contention does not support a claim for ineffective assistance of counsel especially given that a prosecutor's involvement in an investigation of a case is not that unusual.

With regard to the innocent/guilt phase of the proceedings, petitioner asserts that counsel failed to object to gruesome photographs, to the court's failure to specify whether petitioner was guilty of O.R.C. § 2929.04(A)(3) or (4) and to Ohio's definition of proof beyond a reasonable doubt in O.R.C. § 2901.05 as setting an unconstitutionally low standard. Neither do these assertions show ineffective assistance of counsel. The claim regarding the photographs fails for the reasons stated in the eighth ground for relief herein. The claim regarding the specification fails for the reasons stated in the 22nd ground for relief herein. The claim regarding Ohio's definition of proof beyond a reasonable doubt fail for the reasons stated in the ninth ground for relief herein.

For these reasons, petitioner fails to satisfy the test for ineffective assistance of trial counsel and the 12th ground for relief fails.

13. Petitioner was denied the right to the effective assistance of counsel during the mitigation phase of his case in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution.

This claim was not raised on direct appeal but was raised in petitioner's 29th claim for relief in his Petition to Vacate or Set Aside Judgment. (App. Ex. BZ).

The *Strickland* test, set forth above, applies to this claim as well. The Sixth Circuit has specifically stated,

> As for deficient performance and prejudice at sentencing, prejudice exists when 'there is a reasonable probability that, absent the errors, the sentencer... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' *Strickland*, 466 U.S. at 695. A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.' *Id.* at 694

Workman v. Bell, 178 F.3d 759, 769-770 (6th Cir. 1998)

Petitioner asserts that counsel was ineffective in failing to obtain a mitigation specialist. This assertion was rejected immediately above. Petitioner further asserts that counsel failed to adequately advise him regarding the jury waiver. This assertion has also been rejected herein. Petitioner asserts that counsel was ineffective for failing to object to the following during the mitigation phase: the provisions of Ohio's death penalty statutes requiring the accused to prove mitigating factors by a preponderance of the evidence, petitioner's sentence for both felony murder and the underlying felony and Ohio's unconstitutional definition of proof beyond a reasonable doubt. However, these assertions have been rejected herein in the third, 19th and ninth claims for relief.

Petitioner additionally asserts that as a result of his counsel's lack of pre-mitigation investigation and failure to obtain a mitigation expert, counsel failed to prepare a thorough social history and failed to introduce the following:

his mother's overprotectiveness and suffocating attempts to control petitioner's life which led to a lack of sense of independence; the root causes of petitioner's disorder; and the reason petitioner responded so extremely to his victim's calling him an "a-hole," that being his fragile self-esteem, repeated rejection and a shattered defense system. Petitioner asserts that had this evidence been presented it is reasonably probable that the result of his sentence would have been different.

This allegedly absent evidence appears to be taken from the affidavit of psychiatrist Julia Hawgood submitted by petitioner in support of his post-conviction petition. (App. Ex. CA). However, as pointed out by respondent, Hawgood's affidavit is essentially cumulative to the evidence presented by petitioner's two expert witnesses at trial. Indeed, the information gleaned from Hawgood's affidavit is not much different from that contained in all of the expert's reports and testimony on petitioner's background. (App. Exs. N and R). Therefore, no ineffectiveness is shown.

The 13th ground for relief is found to be without merit.

14. The trial court denied petitioner his rights to due process, equal protection, and effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to provide him with a criminalist and a pathologist when these services were reasonably necessary to adequate trial representation and by failing to maintain a complete record of all proceedings thus rendering the record on direct appeal incomplete.

This claim was not raised on direct appeal. Petitioner asserts that a criminalist could have reviewed the trace evidence testing conducted by the state's experts and conducted his own investigation and testing including testing

of various items which were not tested by the state because they were determined not to have evidentiary value. However, petitioner does not explain how retaining a criminalist would have changed the outcome of the trial especially given that petitioner does not really challenge the finding that he was found guilty of the murder, and he in fact confessed to the crime, but rather seems to focus his challenge on the sentence.

Petitioner asserts that a pathologist could have conducted his own investigation and testing and contested the coroner's methodology and findings regarding the cause, manner and timing of death. Again, petitioner does not show how he was really prejudiced by not having a pathologist given that, as found by the court of appeals on direct appeal, "the record in this case contains overwhelming proof of Fox's guilt." *State v. Fox*, 1992 WL 185671 at *6.

Finally, petitioner asserts that the trial court failed to maintain a complete record of all proceedings rendering the record on direct appeal incomplete. Specifically, petitioner asserts that the trial court did not maintain a record of all pretrial hearings and off-the-record conferences. However, while petitioner discusses at length the court's duty in this regard and the law requiring a complete and accurate record, petitioner does not explain how he was prejudiced in his appeal by the lack of a record of some of these proceedings.

This ground for relief is found to be without merit.

15. Petitioner was denied the right to the effective assistance of counsel on his direct appeals as of right in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner filed an Application for Reopening asserting his ineffective assistance of appellate counsel claim. (App. Ex. CM). The Court of Appeals for the Sixth Appellate District denied the application finding that petitioner had not shown good cause for his three year delay in filing it. (App.

Ex. CO). The Ohio Supreme Court affirmed the decision of the court of appeals. (Supp. App. Ex. CT).

Claims for ineffective assistance of appellate counsel are analyzed under the same standards set forth above in *Strickland*. See *Workman*, 178 F.3d at 771. The Sixth Circuit has stated,

> Appellate counsel 'need not advance every argument, regardless of merit, urged by the appellant. Furthermore, there is no constitutional right to have every nonfrivolous issue raised on appeal and tactical choices regarding issues raised on appeal are properly left to the sound professional judgment of counsel.

Id. (citations omitted).

Petitioner asserts that his appellate counsel was ineffective for failing to raise on direct appeal the issues raised in grounds 3, 21, 2, 8, 14, 22, 19, 16, 9, 12, 17 and 23 asserted herein.

However, for the reasons stated in each of these grounds for relief the claim had no merit. Therefore, petitioner is unable to show the prejudice required.

The ground for relief fails.

16. The failure of Ohio's appellate courts to reach a unanimous determination during its independent *de novo* review of the appropriateness of petitioner's death sentence, is a violation of the Eighth Amendment to the United States Constitution.

This claim was not raised on direct appeal. Petitioner reasons in the following manner. Pursuant to Ohio Revised Code, the appellate court must make an independent *de novo* review of a conviction and death sentence. O.R.C. § 2929.05(A). Thus, because the appellate courts have the same power to impose a life sentence as does the jury and trial court, they are "sentencers"in capital cases. In capital cases,

sentencers must unanimously agree that death is the appropriate sentence.

Respondent contests petitioner's reliance on the various cases cited.

For the following reasons, this Court finds this ground to be without merit. O.R.C. § 2929.03(D)(2) states in relevant part,

> If the trial jury unanimously finds... that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following... life imprisonment...

Clearly, the statute requires that a jury's recommendation of death be unanimous. Although O.R.C. § 2929.05(A) requires that the appellate courts independently determine whether the death penalty is appropriate, it does not state that their decision must be unanimous. Furthermore, the Ohio Supreme Court has rejected this contention. *State v. Sowell*, 39 Ohio St. 3d 322, 327 (1988).

The 16th ground for relief fails.

17. Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the failure of Judge Robert V. Franklin and Judge Randall L. Basinger to either decline appointment or remove themselves from petitioner's case due to their inability to be impartial.

This claim was not raised on direct appeal. Petitioner argues that Judges Basinger and Franklin had an inability to be fair and impartial in presiding over this trial. Specifically, petitioner asserts that Judge Franklin was not interested in

hearing his defense and offers his father's affidavit, submitted in support of his post-conviction petition, wherein he avers that he remembers Judge Franklin falling asleep. (App. Ex. CA at H). Additionally, petitioner asserts that Judge Basinger "had significant prosecutorial ties." (Traverse at 156).

Petitioner relies on *Tumey v. Ohio*, 273 U.S. 510 (1927), and cases citing thereto, wherein it is held that the judge who hears a case must be personally disinterested in the outcome. *Tumey* stated, "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." 273 U.S. at 532. Further, "it certainly violates the 14th Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. Petitioner also points to *DelVecchio v. Illinois Dept. of Corrections*, 8 F.3d 509 (7th Cir. 1993), which reiterates, "it violates a defendant's due process rights to subject his life, as well as his liberty and property, to the judgment of a court in which the judge is not neutral or fair." Further, "Because the death penalty is qualitatively and morally different from any other penalty, '[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures.'" *Id.*, citing *Sawyer v. Whitley*, 112 S. Ct. 2514, 2530 (1992) (Stevens, J., concurring) (quoting *Smith v. Murray*, 106 S. Ct. 2661, 2672, (1986) (Stevens, J., dissenting))

However, while the law is firmly established that due process requires a judge to be neutral and fair, petitioner has not presented evidence to the contrary. Petitioner presents his father's affidavit wherein he states that he "recall[ed] Judge Franklin falling asleep." This is insufficient to rise to a due

process violation under the law set forth above. Further, while petitioner asserts that Judge Basinger had "significant prosecutorial ties," he presents no evidence showing any partiality.

This claim for relief is found to be without merit.

18. The trial court erred to the prejudice of petitioner in failing to suppress his statement to the Bowling Green Police Department in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This claim was not raised on direct appeal. Petitioner contends that the trial court's denial of his motion to suppress statements amounted to an unreasonable determination of the facts in light of the evidence and violated his constitutional rights. Petitioner asserts that he was in custody and under investigation at the time he made inculpatory statements to law enforcement officers but was not read his *Miranda* rights. The trial court had determined that petitioner was not "in custody" at the time he made the statements.

Following a hearing, the trial court, in its written opinion denying the motion to suppress, determined the following. Ms. Keckler was allegedly murdered on September 26, 1989. On October 2, 1989, at 7:03 p.m., a municipal judge issued a search warrant for petitioner's car and residence. Petitioner resided with his parents. At 7:30 that same night, a police detective and an investigator drove to the residence in an unmarked police car, identified themselves as police officers to petitioner's father and stated that they would like to speak with petitioner. The officers then identified themselves as such to petitioner and told him they would like to ask him questions about the Keckler murder. Petitioner agreed to answer questions and the three went into the car to talk; petitioner was not restrained. Before asking any questions, the detective told petitioner that he was not under arrest, was free to leave and did not have to talk. After talking with petitioner

for 20 to 30 minutes, petitioner was asked whether he would consent to his vehicle being searched and he agreed. The signed search warrant was not executed. Eight to ten police officers who were waiting about a quarter of a mile away were contacted by telephone to carry out the search. The detective then asked petitioner to answers a few more questions at the police station and petitioner was told he would then be brought home. On the way to the police station, petitioner went unescorted into a store to buy cigarettes. He was unrestrained in the car. At the police station, petitioner went into an office, not locked from the inside, with the officers and was told he could leave at any time. Petitioner signed a written waiver of his *Miranda* rights. He admitted to the murder and was then placed under arrest. When asked whether he would give a taped statement, petitioner agreed but stated he wanted to talk to an attorney first. Petitioner was given a phone and phone book to do so. The trial court determined, after a discussion of applicable law, that petitioner was not "in custody" prior to signing the *Miranda* waiver, he was not the only suspect in the murder, no formal arrest or restraint of movement associated therewith had been imposed on him and petitioner was properly given his *Miranda* warnings which he waived. (App. Ex. AK).

Petitioner points to *Edwards v. Arizona*, 451 U.S. 477 (1981), wherein the United States Supreme Court stated,

> and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further been advised of his rights. We further hold that an accused... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

> Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'

In his Traverse, petitioner does not dispute the factual findings set forth above by the trial court (traverse at 159-160) with the exception of asserting that once petitioner invoked his right to an attorney, the police continued to interrogate him. However, the record shows that once he requested his attorney, the officer asked him one more question "which was a clarification of an issue that had come up during the interview" and then concluded the interview. (App. Ex. A at 126). Petitioner then asserts that the timing of the events is "at best suspicious" in that the officers' testimony shows that the officers arrived at petitioner's home at 7:30 p.m., questioned him, gained consent to search, called other officers to assist in the search of the home and car, drove to the police station while stopping for cigarettes and engaged in some initial questioning before petitioner signed the *Miranda* waiver at 9:09 p.m. However, while petitioner contends that this timing is suspicious, he does not explain how this shows that petitioner may have been "in custody" and, therefore, inappropriately interrogated. Thus, the petitioner does not show how the trial court's ruling was an unreasonable determination of the facts in light of the evidence or contrary to *Miranda*.

This claim for relief is overruled.

19. The aggravating circumstance for which petitioner was convicted merely represented an element of the underlying crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This claim was not raised on direct appeal but it was raised to the extent that petitioner argued, as discussed above in his third ground for relief, that the statutory aggravating

circumstance merely repeats an element of aggravated felony murder. As stated above, this claim was rejected by the state courts. Regardless, it still fails on the merits.

Petitioner was convicted of aggravated felony murder with the underlying felony being kidnapping. He was also convicted on the aggravating circumstance of committing aggravating felony murder while being engaged in the commission of kidnapping. Thus, petitioner argues that aggravating specification contained in the statute merely duplicates the definition of felony murder. Petitioner asserts that this scheme fails to narrow the class of death eligible persons in violation of Supreme Court precedent.

This argument is without merit. Another court in this district has rejected this argument and this Court agrees and adopt its reasoning. *Scott v. Anderson*, - F.Supp. 2d -, 1998 WL 1086056 at *11 (N.D.Ohio, Sept. 30, 1998, O'Malley, J.):

> [Petitioner] argues that the aggravating specification contained in § 2929.04(A)(7) merely duplicates the definition of felony murder in § 2903.01(B), and thus that the same act both convicts and aggravates. This argument is not well-taken. As noted by the Ohio Supreme Court, 'while a conviction under R.C. 2903.01(B) cannot be sustained unless the defendant is found to have intended to cause the death of another, the [S]tate, in order to prevail upon an aggravating circumstance under R.C. 2929.04(A)(7), must additionally prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design.' *State v. Jenkins*, 473 N.E.2d 264, 280 n. 17 (Ohio 1984), *cert. denied*, 472 U.S. 1032 (1985) (emphasis added). Thus, '[t]he trial court had to find that [petitioner] committed murder while committing or attempting to commit [aggravated robbery] and, further,

> that [petitioner] was the principal offender or that the murder was premeditated.' *State v. Barnes*, 495 N.E.2d 922, 925 (Ohio 1986), *cert. denied*, 480 U.S. 926 (1987) (emphasis added). This additional factor does 'narrow the class of persons eligible for the death penalty,' [Zant v. Stephens, 462 U.S. 862 (1983)] at 877—petitioner's 'accomplice could be convicted of aggravated murder but would not be subject to the death penalty.' *Id.* 'By such a limitation, the category of death-eligible aggravated murderers is narrowed in compliance with Zant and no constitutional violation arises.' *Id.*
>
> Moreover, even if it were true that the same act both convicted and aggravated under § 2903.01(B) and § 2929.04(A)(7), this alone would not provide grounds for issuance of the requested writ. '[T]he fact that the aggravating circumstance duplicate[s] one of the elements of the crime does not [alone] make [a death] sentence infirm.' *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). The narrowing function required by *Zant* may be performed by the state legislature. *Id.* at 246-47; see id. at 589 (Brennan, J., dissenting) ('the critical narrowing function may be performed [by the legislature] prior to and distinct from the sentencing process' to ensure 'that the number of those eligible for the death penalty [are] smaller than the number of those convicted of murder'). With § 2929.04(A), the Ohio General Assembly 'narrow[ed] the class of felony murders subject to the death penalty by excluding those who commit [murder in the course of an] arson, robbery, burglary or escape, unless they are charged with a different aggravating circumstance.' *State v. Buell*, 489 N.E.2d 795, 807 (Ohio 1986), *cert. denied*, 479 U.S. 871 (1986).

Furthermore, the Sixth Circuit has recently rejected such a contention aimed at the Tennessee death penalty scheme. *Coe v. Bell*, 161 F.3d 320, 347-350 (6th Cir. 1998).

This ground is found to be without merit.

20. The trial court and appellate courts improperly converted some of petitioner's mitigating evidence into nonstatutory aggravating circumstances in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner argues that the sole aggravating circumstance specified in the indictment was that he was the principal offender and that the offense was committed while committing or attempting to commit aggravated kidnapping and not that he committed the aggravated murder with prior calculation and design. Petitioner cites to O.R.C. § 2929.03(A)(7) but presumably he meant to cite to O.R.C. § 2929.04(A)(7) which provides in pertinent part:

> (A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment... and proved beyond a reasonable doubt:
>
> > (7) The offense was committed while the offender was committing [or] attempting to commit... kidnapping ... and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Petitioner asserts that notwithstanding the fact that no prior calculation or design was charged or found, the three-judge panel of the trial court and the appellate courts treated the kidnapping as though it were a calculated step in a murder plot as evidenced by the trial court's statement in its Opinion that it "took note of the manner which [appellant] planned and executed the events that eventually led to the kidnapping and violent murder of the victim"and the appellate court's statement that "Fox purposely used deception to lure two

young women into his control." Therefore, petitioner asserts, the trial court and appellate courts considered the nonstatutory, uncharged, and unproved manner of *planning the kidnapping* as an aggravating circumstance, weighing it against the mitigating factors. Petitioner asserts that when he then raised this error to the Ohio Supreme Court, it too improperly weighed the evidence and considered an invalid sentencing factor and also excluded relevant mitigation.

The Ohio Supreme Court, in addressing petitioner's contention that the lower courts relied on the improper nonstatutory circumstance, stated:

> ... Fox argues that both the trial court and the court of appeals relied upon nonstatutory, uncharged, and unproved aggravating circumstances to justify the death sentence. We disagree.
>
> 'R.C. 2941.14(B) limits the aggravating circumstances which may be considered in imposing the death penalty to those specifically enumerated in R.C. 2929.04(A).' *State v. Johnson* (1986), 24 Ohio St. 3d 87, 24 OBR 282, 494 N.E.2d 1061, syllabus. Reliance upon nonstatutory aggravating circumstances may constitute reversible error. *State v. Davis* (1988), 38 Ohio St. 3d 361, 369-371, 528 N.E.2d 925, 933-934.
>
> Nonetheless, the trial court could appropriately refer to the 'manner in which [Fox] planned and executed the events' that led to the kidnapping and murder. Kidnapping was the specified statutory aggravating circumstance. Moreover, "[u]nder R.C. 2929.03(F), a * * * three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.' *State v. Stumpf, supra*, at paragraph one of the syllabus. See, also, *State v. Lott, supra*, 51 Ohio St. 3d at 171, 555 N.E.2d at 305.

> Fox also argues that the court of appeals erred in commenting that 'Fox purposely used deception to lure two young women into his control.' We find no error even though Fox was not charged with any offense against Ritchey. The facts of the Ritchey incident were interwoven with the facts and circumstances of the Keckler kidnapping and murder. Moreover, the Ritchey offense was part of Fox's social history and background and reflected upon his character. See *State v. Slagle* (1992), 65 Ohio St. 3d 597, 612, 605 N.E.2d 916, 930; *State v. Cooey* (1989), 46 Ohio St. 3d 20, 35, 544 N.E.2d 895, 914.
>
> We reject Fox's assertion that the trial court and the court of appeals improperly used Fox's strong family and religious background as nonstatutory aggravating circumstances. Instead, both courts simply explained why little weight was given to Fox's mitigation evidence. The weight, if any, to be given mitigation evidence is a matter for the discretion of the sentencer. *State v. Steffen*, *supra*; *State v. Stumpf*, *supra*. 'At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight.' *State v. Richey*, *supra*, 64 Ohio St. 3d at 370, 595 N.E.2d at 929. See, also, *State v. Brewer* (1990), 48 Ohio St. 3d 50, 64, 549 N.E.2d 491, 505.

Fox, 69 Ohio St. 3d at 193-194.

Petitioner contends that the preclusive effect of U.S.C. § 2254(d) should not apply because the decision of the Ohio Supreme Court was not based on federal law. However, the inquiry under § 2254(d) is whether the adjudication by the state court is "*contrary to*, or involved an unreasonable application of"(emphasis added) established federal law as set forth by the United States Supreme Court. Petitioner does not show how it is contrary to clearly established federal law.

Petitioner does assert that *Clemons v. Mississippi*, 494 U.S. 738 (1990) mandates that a new weighing calculus must be performed where the sentencer has considered invalid aggravating circumstances in imposing a death sentence. However, the Ohio Supreme Court did conduct its own independent reassessment and, as evidenced by that court's reasoning as set forth above in the eleventh ground for relief, it did not consider nonstatutory aggravating factors.

This ground for relief is overruled.

21. Both the trial court and the appellate courts conducted an improper proportionality review. Therefore, petitioner's death sentence is disproportionate to the sentences of others in Wood County and to other felony murder convictions with kidnapping specifications in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This claim was raised on direct appeal to the court of appeals and to the Ohio Supreme Court as part of petitioner's third and fourth claims, respectively. (App. Ex. BI and BM). In the court of appeals, petitioner argued that his sentence was disproportionate in comparison to other similar cases (BI at 32 *et seq.*) and in the Ohio Supreme Court argued that the penalty was disproportionate (BM at 43 *et seq.*) The Ohio Supreme Court concluded:

> The death penalty is appropriate, and that penalty is neither excessive nor disproportionate when compared with the penalty imposed in similar cases of aggravated murder during a kidnapping. See *State v. Seiber*, *supra*; *State v. Jells* (1990), 53 Ohio St. 3d 22, 559 N.E.2d 464; *State v. Brewer*, *supra*; *State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267.

Petitioner now asserts that he is the only individual tried for a capital offense in Wood County since this state's current

death penalty law took effect and that after his trial three or four homicide cases were plea bargained. Moreover, petitioner points to other felony murder-kidnapping cases in Ohio and argues that a review of these cases show that his sentence is disproportionate. As to the former argument, this Court has none of the facts of those cases before it and cannot compare those cases (even assuming they were cases in which the death penalty was imposed). As to the latter argument, petitioner asserts that his case differs from those cited because the purpose of the kidnapping here was, allegedly, to engage in sexual activity which did not occur. Rather, petitioner adopted a false persona and when the victim rejected his advances, petitioner killed her although he had not previously intended to do so.

Petitioner presented this precise argument to the Ohio Supreme Court which rejected it. Petitioner does not show how that adjudication was contrary to clearly established federal law. Furthermore, notwithstanding petitioner's failure to address the preclusive effect, this Court does not find the state court's determination to be contrary to clearly established federal law. Therefore, this Court will not stray from that court's finding.

Petitioner also argues that Ohio's proportionality system is constitutionally flawed. This claim has been rejected herein. See third ground for relief.

This ground for relief is found to be without merit.

22. Petitioner's substantive and procedural due process rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution were violated by the failure of the trial court to specify whether he was guilty of kidnapping for the purpose of terrorizing or inflicting serious physical harm or guilty of kidnapping for the purpose

of engaging in sexual activity with the victim against her will.

Petitioner asserts that the trial court failed to specify the type of kidnapping of which he was guilty. This allegedly resulted in a weighing process which was impermissibly weighted in favor of death. Petitioner also asserts that it interfered with his right to effective assistance of appellate counsel in that counsel did not know what it is that was being appealed. Finally, petitioner was deprived his right to a unanimous verdict when the trial court failed to specify of which kidnapping count petitioner was found guilty.

This claim was not raised on direct appeal. The indictment charged that Ms. Keckler was kidnapped by petitioner with the purpose to engage in sexual activity or to inflict serious physical harm. (App. Ex. S). The trial court stated only that the kidnapping was proved beyond a reasonable doubt and did not specify which type of kidnapping. (App. Ex. BG). Respondent argues that sufficient evidence was produced to prove both types of kidnapping in that the victim was found dead in a ditch with multiple stab wounds and her panty hose were violently torn at the crotch and, therefore, petitioner cannot argue that he was denied a fair proceeding.

Petitioner does not explain how the failure of the trial court to specify the kidnapping resulted in a process which was weighted in favor of death or how petitioner was denied a unanimous verdict thereby. To the extent petitioner asserts that his counsel did not know what it was he was appealing, counsel did not really challenge petitioner's guilt on the kidnapping charge (see Opinions of court of appeals and Ohio Supreme Court), which guilt was found by the court of appeals to be "overwhelming."

This ground is found to be without merit.

23. The process of selecting venire persons and grand jury forepersons to serve on grand juries in Wood County and of presenting evidence to grand juries in Wood County is tainted in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

This claim was not raised on direct appeal. Petitioner asserts that the policies adopted and procedures employed by the judges of Wood Count and the Wood County Jury Commissioner in the drawing, selection and empaneling of grand jurors are unconstitutional but does not elaborate.

This claim fails for the following reasons.

There is no constitutional right to be indicted by a state grand jury. *Jefferson v. Morgan*, 962 F.2d 1185, (6th Cir. 1992). "If a state chooses to use a grand jury, it must select members of the grand jury without discrimination based on race or color." *Id.*, citing *Aldridge v. Marshall*, 765 F.2d 63, 68 (6th Cir.1985). The exclusion of women from the grand jury may also provide a basis for a constitutional claim. See *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). However, petitioner does not explain or put forth evidence supporting his argument that the grand jury drawing, selection or empaneling was unconstitutional.

This ground for relief fails.

24. Petitioner was denied his rights to a fair hearing and due process in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the State failed to provide his counsel with exculpatory evidence prior to trial.

This claim was first raised in petitioner's post-conviction petition and was dismissed by the trial court. (App.Exs. BZ and CE). Petitioner asserts herein that in support of his post-conviction petition he had submitted newspaper articles

documenting that the prosecutors involved in petitioner's case uniformly withheld evidence in other cases. Petitioner asserts that this is shown by a newspaper article wherein one of the judges on petitioner's three-judge panel states in a judgment entry dismissing a case for prosecutorial misconduct that his 12 years on the bench have shown him that the prosecutor's office "is reluctant to provide discovery of almost everything." (App. Ex. CA at P-8). Petitioner asserts that his counsel "requested such information prior to trial. However, the prosecutor failed to provide defense counsel with material evidence. While petitioner does have some support for his belief that petitioner was denied exculpatory, the majority of the information is contained in files which have been undisclosed to petitioner." (traverse at 179).

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the suppression of material exculpatory evidence violates the defendant's due process rights. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Here, the basis for petitioner's assertion that the prosecutor failed to turn over exculpatory evidence is no more than speculation and presumption premised on the prosecutors' conduct in other cases. The Sixth Circuit has stated that "mere speculation"is insufficient to satisfy the due process standard. *United States v. Valentine*, No. 94-6195, 1995 WL 390322 (6th Cir. 1995), citing *United States v. Driscoll*, 970 F.2d 1472 (6th Cir. 1992).

For these reasons, this ground is found to be without merit.

25. The cumulative error in petitioner's case makes petitioner's death sentence unreliable, inappropriate

and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This claim fails for the reasons stated in the discussion above regarding grounds for relief 1-24.

IV. Conclusion

For the foregoing reasons, the Petition for Writ of Habeas Corpus is denied. Accordingly, this action is dismissed. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Federal Rule Appellate Procedure 22(b).

IT IS SO ORDERED.

PATRICIA A. GAUGHAN
United States District Judge

SUPREME COURT OF OHIO

The STATE of Ohio, Appellee,

v.

FOX, Appellant.

No. 92-2019.
Submitted Jan. 25, 1994.
Decided May 4, 1994.

On September 14, 1989, Leslie Keckler applied for a waitress job at a Bowling Green restaurant. Defendant, Richard E. ("Dick") Fox, worked there as a grill cook. As Keckler filled out her job application, Fox pointed out Keckler to a coworker and said, "I'd like to have some of that." At Fox's request, the restaurant manager showed Fox the job application, which included Keckler's telephone number.

Sometime after September 14, Keckler told her boyfriend, girlfriend, and mother about an exciting restaurant supply job opportunity. Keckler described the job to her girlfriend and said that she had an interview. According to Keckler's mother, her daughter was very excited about this "sales route" job, which involved selling supplies such as towels and aprons to local area restaurants.

On the evening of September 26, Keckler went to the Holiday Inn where a job interview for the sales route job was to take place. Keckler's boyfriend saw her just before she left. Keckler told him she might be gone for two or three hours while she went over the sales route. When Keckler did not come home that night, her boyfriend and mother filed a missing persons report with police. Police found the car Keckler had been driving abandoned at the Woodland Mall.

On September 30, two boys riding bicycles found Keckler's body in a rural drainage ditch. Keckler was still wearing her new black dress and leather jacket. However, a

clasp on her brassiere was broken, her belt was unbuckled, two dress buttons were missing, and her pantyhose were torn in the crotch. Aside from a nearby shoe, police found no other evidence at the scene.

Keckler had died as a result of asphyxia from ligature strangulation and multiple stab wounds. She had been stabbed six times in the back; three stab wounds penetrated her lungs. Her right wrist had a deep gash, and her face had bruises on her left eye, upper lip, and nose consistent with blunt force injury. The coroner found no signs of sexual molestation.

The evidence at trial later showed that at the hotel, Keckler had met Fox, who later stabbed her six times, strangled her with a rope, dumped her body into a ditch, and then drove home. The facts surrounding Keckler's abduction reminded police of an incident several months earlier involving Marla Ritchey and an unknown man who called himself "Jeff Bennett." In May 1989, Marla Ritchey had applied for a waitress job at a Bowling Green restaurant. Fox then worked at that restaurant. Some days later, arrangements were made for Ritchey to go to the Bowling Green Holiday Inn for an 8:00 p.m. "job interview." At the Holiday Inn, Fox, calling himself Jeff Bennett, told Ritchey that he worked for Great American Foods, and they needed a local sales representative. Ritchey agreed to accompany "Bennett" in his car that evening to discuss the job.

After driving a distance and parking, Bennett (Fox) told Ritchey he thought her dress was too long. Eventually, Ritchey decided this was a "fake interview" and told Fox she was not interested in the job. Fox then asked what Ritchey would do if someone "pulled a knife" on her and asked her for money, or asked her "to do other things." When Ritchey jumped out of the car, Fox tried to grab her and said "come back, that he wasn't finished with [her] yet." Ritchey immediately reported the May incident to the police and helped them prepare a composite police sketch of Bennett.

Because of the similarity between Keckler's abduction and the earlier Ritchey incident, police circulated an updated composite sketch of "Bennett," the man Ritchey had met. Police thought he might be a suspect in Keckler's abduction. On October 2, an acquaintance of Fox told police that this composite sketch resembled Richard Fox of Tontogany. Police confirmed that Fox matched Ritchey's description of "Bennett," and Fox's car also matched the description of "Bennett's" car.

On October 2, police secured a warrant to search Fox's car and the home where Fox lived with his parents. Then, Detective Sergeant Thomas Brokamp and Investigator John Helm drove there. Fox consented to a police search of the house and his car.

After other officers conducted the search and found some suspicious items, Fox agreed to go voluntarily to the police station, where he waived his *Miranda* rights and agreed to talk further with police. Before Fox was placed under arrest, he admitted that in early May he had worked at a restaurant where Marla Ritchey had applied for a job, that he met Ritchey at the Holiday Inn, and that he took her for a drive and discussed her skirt length.

Fox also admitted he knew Keckler and claimed they had met and talked at the restaurant where he worked and met again a couple of days later. He described his encounter with Keckler at the Holiday Inn on September 26 as a date. Later, at the mall, "he saw Leslie and they talked and ended up taking a drive in his car."

Fox said that, after driving for a while, he and Keckler parked, and "things were getting warmed up." However, "then Leslie did not want to participate." She called him "an asshole and started to get out of the car." Fox told detectives, "no one calls me an asshole." Then "he grabbed Leslie by the coat as she was standing up to get out of the car and pulled her back in," and he "pulled the coat up over her head." Fox got

a knife out of the glove compartment and "stabbed her in the back 4 or 5 times." Then, he "got the rope out of the trunk 'just to make sure she was dead' [and] strangled her." Police terminated the interview when Fox asked for a lawyer.

During the interview, Fox also described another remote rural location. At that location, police subsequently recovered Keckler's purse, her notebook, a letter she had written, her other shoe, a button from her dress, and a piece of nylon cord. Forensic examination of Fox's car revealed blood on the front passenger seat, door, and window. Samples tested were Keckler's blood type. In Fox's garage, police found a fillet knife and a thin nylon rope; both had blood on them.

A grand jury indicted Fox for kidnapping and aggravated murder with a felony-murder death penalty specification alleging kidnapping. After Fox's motion for a change in venue was overruled by the trial court, Fox waived a jury and tried the case to a three-judge panel.

At the guilt phase, Fox's retained counsel conceded that Fox had killed Keckler but disputed that the evidence established kidnapping. The parties stipulated that Fox had no criminal record. On cross-examination, some witnesses testified to Fox's good character and hard work. Despite his arguments, the three-judge panel convicted Fox as charged.

At the sentencing hearing, Fox presented several character witnesses and expert witnesses who testified regarding his mental condition. Testimony from his mother and Dale Fox, his adoptive father, established that Dick's natural father, Walter Low, drowned before Dick was born. Two and one-half years after Low died, Fox's mother married Dale Fox; they moved to Tontogany and raised Dick and their own two daughters. Dale adopted Dick when he was twelve years old because the different last names of the children caused difficulty. When Dick was adopted, his paternal grandparents refused to have anything more to do with him.

While growing up, Fox was active in Little League, church activities and Boy Scouts, where he received the "God and Country Award." He played football and baseball throughout high school. He was described as friendly, kind, very energetic, and helpful to others; he also helped around the house a lot, taking good care of the four-and-one-half-acre grounds where the family lived. After high school, Fox attended Owens Technical College, where he studied to be a chef. For the fifteen or so years before his arrest, he worked as a cook, near minimum wages, at twenty different restaurants. In his leisure time, he played softball and other sports and raised rabbits.

In 1980, Fox moved from his mother's home and married Kim Swinehart. They had a daughter, Jessica, born in 1982. In 1983, he and Kim separated, and Kim died. Fox and his daughter Jessica then moved back into Dale Fox's home and lived there until this offense. Fox's mother took care of Jessica while he was at work. Fox was described as a good father who spent time with Jessica and loved her very much.

Friends and neighbors who had known Fox his entire life testified as to his good character. The Tontogany postmaster described Fox as gentlemanly, cooperative, and respectable. Fox's teacher at Owens Technical described him as cheerful, outgoing, courteous, sensitive and respectful. A retired minister knew the Fox family as a pillar of the community. As a youngster, Fox was very active in Bible study and church service projects and remained active as an adult. According to the minister, "any man would have been proud to have called him son."

A good friend of Fox's for twenty years described Fox as very kind. Another friend described Fox as a normal, honest American boy with a good community reputation. Fox's family was very religious and civic minded. A neighbor for thirty years testified Fox was a fine, honest person. Another neighbor believed Fox was a friendly, honest boy from a good

Christian home, with a good reputation for honesty and integrity.

An aunt who helped raise him testified that she loved him very much, and he loved her. Jerry Wiles, a minister engaged to one of Fox's sisters, visited Fox in jail and testified he was very remorseful and filled with repentance. Reverend Wiles felt Fox was a calming and stabilizing influence over other prisoners.

A sheriff's lieutenant, deputy sheriff, and corrections officer all described Fox as a model prisoner and a nice man, who was very cooperative and who interacted well with other prisoners. Fox helped set up a prisoners' library and also helped save the life of a diabetic inmate who went into shock.

A lifelong friend testified that Fox did not have good relations with women, exaggerated his friendships with women, and was a "story teller." Yet, Fox was very honest, and a strong friend whom one could trust.

Unlike most death penalty cases where the defendants have been subjected to neglect, sometimes mental and physical abuse from family members, and have few positive or constructive values, Fox's criminal conduct is strikingly inconsistent with his life experiences and the values he had been taught.

Two clinical psychologists, Dr. Newton L.P. Jackson, Jr. and Dr. Barbara McIntyre, and a psychiatrist, Dr. Thomas Sherman, testified that Fox suffered from a severe, lifelong, "narcissistic personality" disorder. Nonetheless, no expert described this disorder as a mental disease or defect which rendered Fox substantially incapable of appreciating the difference between right and wrong or conforming his behavior to the law.

Dr. Jackson testified that as Fox grew older he became more alienated, afraid and alone. Fox was never truly integrated into his family and never developed any satisfactory

relationships with women. Fox's IQ was ninety-one, at the "bottom of the normal range, and he had trouble understanding human relationships and processing ideas and thoughts.

Family members never knew about Fox's "narcissistic personality." Dr. Jackson agreed this disorder was characterized by "extreme feelings of inferiority," "grandiose fantasies," and "extreme envy" and "hostility toward women." Fox created a fantasy and lived "within that fantasy" to shield himself from the truth of his lack of self-worth. Although "very emotional," Fox had little control over his emotions.

Fox developed a lifelong pattern, believing that women could give him what he lacked, "unconditional feelings of regard"; instead, they rejected him. Rejection by Kim, his deceased wife, devastated him. After Jill, his former fiancee, rejected him in April 1989, Fox became depressed, more "irritable" and "aggressive," less communicative, and more inclined to "exert power" over women to "achieve their respect."

Dr. Jackson believed that when Fox killed Keckler, he "lost control" as a result of his severe personality disorder. Keckler's "asshole" comment "stripped away Mr. Fox's ability to deceive himself." He erupted in "rage" against Keckler, a symbol of lifetime injuries and slights. Thus, this was a "panic" or "impulsive" murder.

Dr. Sherman, the psychiatrist, described Fox as extremely bitter, envious of others, and prone to rationalizations and grandiose fantasies to compensate for a lack of self-esteem. Persons with a narcissistic personality disorder typically achieve very little, suffer a striking inability to integrate into their environment, and rationalize shortcomings rather than try to improve themselves. Fox suffered from an "intermingling of sexual and aggressive impulses."

Dr. McIntyre described Fox as impulsive, with excess energy, outgoing, talkative, and suffering from a delusional

sense of self-importance. Testing revealed Fox to have problems in anger control, negative attitudes and depression. Neither Sherman nor McIntyre believed that Fox was totally honest when describing the circumstances of the offense.

All of the expert testimony tends to diminish the weight to be given the positive character testimony. In a brief unsworn statement, Fox said he was very sorry for the offense and felt unworthy to be part of any family. He prayed that in his remaining time, he would keep his daughter from making the same mistakes he did. When arrested, he felt relieved that someone was finally going to help him. Since he has been in jail, he has seen himself in a different light. He asked that his life be spared so that he could help others.

After considering this sentencing evidence, the trial panel sentenced Fox to death. The court of appeals affirmed the conviction, and in a two-to-one decision found the death penalty to be appropriate and affirmed that penalty.

The cause is now before this court upon an appeal as of right.

Alan R. Mayberry, Wood County Pros. Atty., for appellee.

Secor, Ide & Callahan, John J. Callahan and Jeffrey M. Gamso, Toledo, and Harry R. Reinhart, Columbus, for appellant.

MOYER, Chief Justice.

We have reviewed Fox's eight propositions of law, independently assessed the evidence relating to the death sentence, balanced the aggravating circumstance against the mitigating factors, and compared the sentence to those imposed in similar cases. As a result, we affirm the convictions and sentence, including the death penalty.

I
PROCESS

A. Change of Venue

In his fifth proposition of law, Fox argues that the prosecutor committed egregious misconduct by placing Fox's confession on the public record, thereby causing extensive pretrial publicity. Fox argues that only a change of venue could have vindicated his fair trial rights.

Following Fox's arrest, his counsel submitted a discovery request to the prosecutor, including a request for copies of any pretrial statements by Fox. The prosecutor promptly responded, and that response included copies of the detective's notes reflecting Fox's oral confession. The prosecutor also filed his discovery response with the clerk of courts, readily making it available to the public.

Following the discovery of Keckler's body and Fox's arrest, newspapers and T.V. stations in Bowling Green and neighboring cities extensively publicized the case, including details of Fox's confession. The trial court rejected Fox's motion for a change of venue. In March, Fox waived his right to a jury trial, and no attempt to seat a jury was ever made.

Fox questions the prosecutor's conduct and motive in filing the discovery response, thereby making Fox's confession publicly available. We agree with the conclusion of the court of appeals that the prosecutor erred by filing with the clerk of courts the documents requested by defendant's counsel pursuant to Crim.R. 16. The dangers pretrial publicity may present to the constitutional rights to a fair trial are obvious.

However, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L.Ed.2d 78, 87. Accord *State v. Lott* (1990), 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 301.

In this case, Fox received a fair trial before an impartial three-judge panel, and the prosecutor's act in filing the response to the request for discovery did not prejudice Fox. Fox raised no claim here, or at the court of appeals, that the confession was inadmissible. Moreover, judges are presumed in a bench trial to rely only upon relevant, material, and competent evidence. *State v. Davis* (1992), 63 Ohio St. 3d 44, 48, 584 N.E.2d 1192, 1196; *State v. Post* (1987), 32 Ohio St. 3d 380, 384, 513 N.E.2d 754, 759.

"Any decision on changing venue rests largely in the discretion of the trial court. Absent a clear showing of an abuse of discretion, the trial court's decision controls." *State v. Landrum* (1990), 53 Ohio St. 3d 107, 116, 559 N.E.2d 710, 721-722. See, also, Crim.R. 18; R.C. 2901.12(K); *State v. Spirko* (1991), 59 Ohio St. 3d 1, 23, 570 N.E.2d 229, 253-254. Moreover, the interests of judicial economy, convenience, and reduction of public expenses necessitate that judges make a good faith effort to seat a jury before granting a change in venue. *State v. Warner* (1990), 55 Ohio St. 3d 31, 46, 564 N.E.2d 18, 33; *State v. Herring* (1984), 21 Ohio App.3d 18, 21 OBR 19, 486 N.E.2d 119. "It has long been the rule in Ohio that '[t]he examination of jurors on their *voir dire* affords the best test as to whether prejudice exists in the community * * *.'" *State v. Maurer* (1984), 15 Ohio St. 3d 239, 250-251, 15 OBR 379, 389, 473 N.E.2d 768, 781, quoting *State v. Swiger* (1966), 5 Ohio St. 2d 151, 34 O.O.2d 270, 214 N.E.2d 417, paragraph one of the syllabus.

In this case, Fox's claim that he was "forced" to waive a jury because of pretrial publicity lacks merit. Because no attempt was made to seat a jury, no proof exists that a fair jury could not have been seated. Even Fox's own expert witness admitted that sixty-two percent of the voters he surveyed in January 1990 said they could put aside any prior knowledge of the case and decide it on the evidence. By the time of trial, in May 1990, the publicity had lessened considerably. Thus, we reject this proposition of law.

B. Assignment of Retired Judge

In his seventh proposition of law, Fox argues that a retired judge is ineligible to sit as a panel member in a capital case. Fox contends his conviction and sentence are void since a retired judge sat on his trial panel. However, Fox's proposition lacks any merit.

Section 6(C), Article IV of the Ohio Constitution specifically authorizes the Chief Justice of this court to assign a retired judge, "with his consent," to "active duty as a judge." In *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St. 3d 28, 30, 6 OBR 50, 52, 451 N.E.2d 225, 228, we upheld the propriety of assignment of retired judges, rejecting the argument that "the Ohio Constitution requires a trial judge to have been elected and currently serving his term" to sit upon the trial of a case. And in *Pocker v. Brown* (C.A.6, 1987), 819 F.2d 148, a United States Court of Appeals rejected federal constitutional challenges to retired Ohio judges sitting as trial judges.

Additionally, neither the Constitution nor statutory law restricts the type of case to which a retired judge may be assigned. R.C. 2945.06 regulates capital trials before a panel, but the statute neither excludes retired judges from sitting upon such panels nor implies such an exclusion.

Retired judges are as competent as full-time judges to serve as panel members in capital cases. Contrary to Fox's implication, no logic compels a conclusion that judges who must face reelection challenges are more fair to capital defendants than retired jurists. Moreover, retired jurists represent a valuable judicial resource when they can sit upon capital panels, thereby helping to minimize unnecessary delay in a time of crowded dockets. See *State ex rel. Keefe v. Eyrich* (1986), 22 Ohio St. 3d 164, 166, 22 OBR 252, 254, 489 N.E.2d 259, 261. Thus, no reasons exist to prohibit a retired jurist from sitting on a three-judge panel in a capital case.

C. Constitutionality

In his eighth proposition of law, Fox challenges the constitutionality of Ohio's death penalty statute. We reject Fox's proposition of law on the authority of *State v. Poindexter* (1988), 36 Ohio St. 3d 1, 520 N.E.2d 568, syllabus; *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E.2d 264.

II
SENTENCE ERRORS

A. Failure to Comply with R.C. 2929.03(F)

In his first proposition of law, Fox argues that the three-judge panel failed to consider mitigating factors and explain why the aggravating circumstance outweighed mitigating factors. Fox relies upon a section of the trial panel's opinion headed, "Why the Aggravating Circumstance is Sufficient to Outweigh The Mitigating Factors." As Fox correctly argues, that section recites only what the panel considered and does not explain why the aggravating circumstance outweighed mitigating factors.

R.C. 2929.03(F) specifies the findings a trial court or three-judge panel must make when imposing a death sentence. Among other requirements, the statute requires "specific findings" as to "the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors." Fox argues that deficiency was fatal because the panel never answered this "why" question. The dissent in the court of appeals agrees with Fox.

The trial court's seven-page opinion specified what mitigating factors were unproved or proved and what weight the panel gave to proven mitigating factors. For example, the court described Fox's strong family and religious upbringing as well as his favorable character traits. However, the panel gave this factor "little weight" because Fox was "given an

environment which should have allowed him to be able to follow the laws of our society." The court also recognized his "personality disorders" and "education and experiences" and stated that it gave "due weight" to those factors.

The panel correctly identified the aggravating circumstance and did not rely upon nonstatutory aggravating circumstances.

Much of Fox's argument assumes that particular evidence must be given a certain degree of favorable weight. However, "[t]he fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen* (1987), 31 Ohio St. 3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus. "In fact, the assessment and weight to be given mitigating evidence are matters for the trial court's determination." *State v. Lott, supra,* 51 Ohio St. 3d at 171, 555 N.E.2d at 305. See, also, *State v. Stumpf* (1987), 32 Ohio St. 3d 95, 512 N.E.2d 598, at paragraph two of the syllabus.

We have previously held that our independent review of a sentence will cure any flaws in the trial court's opinion. *State v. Maurer, supra,* 15 Ohio St. 3d at 247, 15 OBR at 386, 473 N.E.2d at 778, recognized the importance of a trial court's reasoning in choosing the death penalty. However, *Maurer* held that such a deficiency in reasoning was not prejudicial because the independent reassessments by the court of appeals and this court purged any such error. *Id.*

In *State v. Lott, supra,* 51 Ohio St. 3d at 170-173, 555 N.E.2d at 304-306, we also found serious deficiencies in the trial panel's death penalty written opinion. However, we held in *Lott* that these errors were "rectified by this court's careful independent reweighing." *Id.* at 170, 555 N.E.2d at 304. See, also, *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S. Ct. 1441, 108 L.Ed.2d 725; *State v. Landrum, supra,* 53 Ohio St. 3d at 124, 559 N.E.2d at 729.

The trial court's opinion in this case causes us to once again admonish trial courts to carefully comply with every specific statutory requirement in R.C. 2929.03(F). As was stated in *Maurer, supra,* 15 Ohio St. 3d at 247, 15 OBR at 386, 473 N.E.2d at 778, "[t]he failure of a trial court to comply with this aspect of R.C. 2929.03(F) disrupts the review procedures enacted by the General Assembly by depriving the defendant and subsequent reviewing courts of the trial court's perceptions as to the weight accorded all relevant circumstances."

B. Substantial Impairment

In his second proposition of law, Fox argues that the mitigating factor specified in R.C. 2929.04(B)(3), substantial impairment of capacity, is proved by evidence of a severe "personality disorder," such as his narcissistic personality disorder. To qualify for the R.C. 2929.04(B)(3) mitigating factor, a defendant must prove that, because of a "mental disease or defect," he "lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct" to legal requirements.

No expert witness testified that Fox's personality disorder qualified as a "mental disease or defect" or that it deprived Fox of "substantial capacity to appreciate the criminality" of what he did or "conform his conduct" to the law. Dr. Jackson explained that Fox's personality disorder "is not a term which can be brought within the definition of a mental disease or mental defect * * *." Dr. Sherman, the psychiatrist, asserted it was "quite clear medically that [Fox] did not suffer from a mental disease or defect which rendered him substantially incapable of appreciating right or wrong or conforming his behaviors" to law. Dr. McIntyre also agreed that Fox's personality disorder did not meet the requirements for that mitigating factor.

Moreover, in other cases, we have recognized that a "personality" or "behavior" disorder did not meet the

requirements of R.C. 2929.04(B)(3) as a statutory mitigating factor. See *State v. Richey* (1992), 64 Ohio St. 3d 353, 372, 595 N.E.2d 915, 930-931; *State v. Seiber* (1990), 56 Ohio St. 3d 4, 9, 564 N.E.2d 408, 415; *State v. Van Hook* (1988), 39 Ohio St. 3d 256, 262-263, 530 N.E.2d 883, 889-890.

C. Weighing Mitigation

In his third proposition of law, Fox argues the trial court erred by intermingling the separate evidence of Fox's alleged mental defect, under R.C. 2929.04(B)(3), with evidence of his history and background. However, that proposition lacks any merit because Fox never proved the mental-defect mitigating factor at trial. Nonetheless, the trial court did consider evidence of Fox's "personality disorder" as a relevant "other factor" under R.C. 2929.04(B)(7).

A decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign a given factor is a matter for the discretion of the individual decisionmaker. See *State v. Mills* (1992), 62 Ohio St. 3d 357, 376, 582 N.E.2d 972, 988. "[E]vidence of an offender's history, background and character * * * [not found] to be mitigating, need be given little or no weight against the aggravating circumstances." *State v. Stumpf, supra,* at paragraph two of the syllabus.

D. Improper Aggravating Circumstances

In his sixth proposition of law, Fox argues that both the trial court and the court of appeals relied upon nonstatutory, uncharged, and unproved aggravating circumstances to justify the death sentence. We disagree.

"R.C. 2941.14(B) limits the aggravating circumstances which may be considered in imposing the death penalty to those specifically enumerated in R.C. 2929.04(A)." *State v. Johnson* (1986), 24 Ohio St. 3d 87, 24 OBR 282, 494 N.E.2d 1061, syllabus. Reliance upon nonstatutory aggravating

circumstances may constitute reversible error. *State v. Davis* (1988), 38 Ohio St. 3d 361, 369-371, 528 N.E.2d 925, 933-934.

Nonetheless, the trial court could appropriately refer to the "manner in which [Fox] planned and executed the events" that led to the kidnapping and murder. Kidnapping was the specified statutory aggravating circumstance. Moreover, "[u]nder R.C. 2929.03(F), a * * * three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." *State v. Stumpf, supra,* at paragraph one of the syllabus. See, also, *State v. Lott, supra,* 51 Ohio St. 3d at 171, 555 N.E.2d at 305.

Fox also argues the court of appeals erred in commenting that "Fox purposely used deception to lure two young women into his control." We find no error even though Fox was not charged with any offense against Ritchey. The facts of the Ritchey incident were interwoven with the facts and circumstances of the Keckler kidnapping and murder. Moreover, the Ritchey offense was part of Fox's social history and background and reflected upon his character. See *State v. Slagle* (1992), 65 Ohio St. 3d 597, 612, 605 N.E.2d 916, 930; *State v. Cooey* (1989), 46 Ohio St. 3d 20, 35, 544 N.E.2d 895, 914.

We reject Fox's assertion that the trial court and the court of appeals improperly used Fox's strong family and religious background as nonstatutory aggravating circumstances. Instead, both courts simply explained why little weight was given to Fox's mitigation evidence. The weight, if any, to be given mitigation evidence is a matter for the discretion of the sentencer. *State v. Steffen, supra; State v. Stumpf, supra.* "At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any

weight." *State v. Richey, supra,* 64 Ohio St. 3d at 370, 595 N.E.2d at 929. See, also, *State v. Brewer* (1990), 48 Ohio St. 3d 50, 64, 549 N.E.2d 491, 505.

III

INDEPENDENT REASSESSMENT

In his fourth proposition of law, Fox argues that, after independent reassessment, we should find the death sentence inappropriate and disproportionate and remand for the imposition of a life sentence. Fox argues that the evidence of kidnapping, or of violence in the kidnapping, is weak and circumstantial; hence, that aggravating circumstance is entitled to minimal weight when weighed against substantial mitigating factors.

However, kidnapping can be by deception, R.C. 2905.01, and we find the evidence proved this aggravating circumstance beyond a reasonable doubt. Simply because the kidnapping involved deception rather than force offers scant reason to minimize this aggravating circumstance. The evidence showed that Fox secured Keckler's phone number and then called her pretending to be a prospective employer. Keckler expressed enthusiasm for her new "job" to her mother, girlfriend and boyfriend. These facts demonstrate Fox's careful planning of his "job interview" with Keckler. Additionally, Keckler's body revealed other signs of struggle; her face was bruised, and her clothing was disarranged.

We find nothing in the circumstances of the offense to be mitigating. Under any reasonable interpretation of the evidence, Fox lured Keckler by careful deception into a situation where he could control or dominate her for his own gratification. For whatever reason, he then brutally stabbed and strangled her and callously dumped her body in a ditch.

In contrast, Fox's history, character, and background do present unusual mitigating features. Numerous witnesses attested to Fox's good character and favorable community

reputation. Additionally, Fox's steady, honest employment since high school graduation is relatively unusual among those persons convicted of aggravated murder and sentenced to death. Thus, Fox's history, character and background are entitled to weight in mitigation.

Fox also lacks any prior criminal record; he thus has the benefit of that statutory mitigating factor in R.C. 2929.04(B)(5). Additionally, the support of Fox's family and friends, his love and care of his daughter, his remorse, and his relatively successful adjustment to pretrial confinement in the county jail can all be considered as favorable "other factors" under R.C. 2929.04(B)(7). Fox's personality disorder is also a mitigating "other factor." All of these factors are entitled to some weight.

However, the foregoing exhausts Fox's mitigating factors. Even if Keckler called Fox a name, she did not thereby "induce" or "facilitate" the offense within the meaning of R.C. 2929.04(B)(1). Nor was Fox acting "under duress, coercion, or strong provocation" when he reacted to that name. See *State v. Seiber, supra,* 56 Ohio St. 3d at 8, 564 N.E.2d at 415; *State v. Clark* (1988), 38 Ohio St. 3d 252, 263, 527 N.E.2d 844, 856; R.C. 2929.04(B)(2). As discussed previously, Fox's personality disorder did not qualify as a "mental disease or defect" under R.C. 2929.04(B)(3). At thirty-three years of age, and as the principal offender, Fox did not meet the mitigating factors in R.C. 2929.04(B)(4) or (B)(6). Although Fox confessed, he did so only after initially denying any involvement, and his confession is entitled to no weight. Aside from those mentioned earlier, there are no other mitigating factors.

When the aggravating circumstance is weighed against the mitigating factors, we find the aggravating circumstance of kidnapping outweighs the mitigating factors beyond a reasonable doubt. Although Fox kidnapped Keckler by deception, rather than force, considerable effort and planning

apparently went into that kidnapping. Fox lured a vulnerable eighteen-year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her. Then he deliberately got a rope out of the trunk and strangled her "just to make sure she was dead." After doing this, he dumped her body in a drainage ditch and drove home.

Although Fox's steady employment, favorable character testimony, and lack of a prior criminal record are noteworthy, we accord them only modest weight in light of all the other circumstances. Fox faced few challenges and little adversity in his life compared with many others. Although Fox's mental disorder may be a mitigating "other factor," such a disorder tends to undercut any prospect of successful rehabilitation. Thus, the aggravating circumstance outweighs mitigating factors, even when the mitigating factors are considered in their entirety.

The death penalty is appropriate, and that penalty is neither excessive nor disproportionate when compared with the penalty imposed in similar cases of aggravated murder during a kidnapping. See *State v. Seiber, supra; State v. Jells* (1990), 53 Ohio St. 3d 22, 559 N.E.2d 464; *State v. Brewer, supra; State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267.

For the foregoing reasons, appellant's convictions and sentence are affirmed.

Judgment affirmed.

DOUGLAS, BETTMAN, FRANCIS E. SWEENEY, SR., and P. EIFER, JJ., concur.

A. WILLIAM SWEENEY and WRIGHT, JJ., concur in part and dissent in part.

MARIANNA BROWN BETTMAN, J., of the First Appellate District, sitting for RESNICK, J.

WRIGHT, Justice, concurring in part and dissenting in part.

I would affirm appellant's conviction but respectfully dissent as to the majority's affirmance of appellant's death sentence.

I agree with the views of Judge James R. Sherck of the Court of Appeals for Wood County, whose separate opinion in the case below reads as follows:

"In reviewing the penalty phase of the trial, I believe the trial court improperly considered certain evidence as an aggravating circumstance and failed to articulate, pursuant to the requirements of R.C. 2929.03(F), why the aggravating circumstance is sufficient to outweigh the mitigating factors.

"I.

"R.C. 2929.03(F) provides that on imposition of a death sentence the court or the panel of three judges:

" ' * * * shall state in a separate opinion its specific findings as to [statutory] mitigating factors, * * * other mitigating factors, the aggravating circumstances the offender was found guilty of committing, *and the reasons why the aggravating circumstances* the offender was found guilty of committing were sufficient to *outweigh the mitigating factors.* * * * ' (Emphasis added.)

"In the instant case the panel of judges prepared a separate opinion discussing the single aggravating circumstance found and the mitigating factors presented by appellant. In the portion of its opinion entitled 'Why the Aggravating Circumstance is Sufficient to Outweigh The Mitigating Factors' the court summarily concluded that upon consideration of the evidence, ' * * * the aggravating circumstance sufficiently outweighed the mitigating factors

presented in this case.'[1] It is clear to me that such an entry fails to satisfy the statutory requirement of R.C. 2929.03(F).

"The purpose of the statutory requirement that a trial court and reviewing courts articulate the mental processes by which the decision to impose the death penalty was made is that this procedure provides a final opportunity for the decision maker and reviewing courts to expunge their reasoning of inappropriate matters. See R.C. 2929.05. For example, a sentence predicated on an aggravating circumstance that the murder was outrageously or wantonly vile, horrible, or inhuman is overbroad, because it does not sufficiently distinguish a case from others where death sentences were not imposed. *Godfrey v. Georgia* (1980), 446 U.S. 420 [100 S. Ct. 1759, 64 L.Ed.2d 398]. The logic being that, ' * * * a person of ordinary sensibility could fairly conclude that virtually every murder is outrageously or wantonly vile, horrible, or inhuman.' *State v. Maurer* (1984), 15 Ohio St. 3d 239, 242 [15 OBR 379, 382, 473 N.E.2d 768, 775]. Even the reasoning of seasoned jurists may lapse to the arbitrary or capricious when faced with a senseless killing. This is the reason capital sentencing schemes must be designed to channel the discretion of the sentencing body. See *Zant v. Stephens* (1983), 462 U.S. 862, 874-878 [103 S. Ct. 2733, 2741-2743, 77 L.Ed.2d 235, 248-251]; *Wainright v. Goode* (1983), 464 U.S. 78, 87 [104 S. Ct. 378, 383, 78 L.Ed.2d 187, 194].

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[1] Reproduced in its entirety this section [of the trial court's opinion] is as follows:

> "'Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, the statement of the offender, arguments of counsel, and the mental report submitted pursuant to R.C. 2929.03(D)(1), the panel found, by proof beyond a reasonable doubt, that the aggravating circumstance sufficiently outweighed the mitigating factors present in this case. The panel, in compliance with R.C. 2929.03(D)(3) and after full deliberations, unanimously imposed the death sentence.'"

"The gravity and the finality of the death penalty commands that at each juncture the decision making process be examined and reexamined to assure that this sanction is not imposed arbitrarily or disproportionately. For this reason, sentencing statutes which provide for a balance of clear and concrete aggravating and mitigating factors and incorporate meaningful appellate review are favored. *State v. Maurer, supra* [15 Ohio St. 3d] at 246 [15 OBR at 385, 473 N.E.2d at 777-778], citing *Gregg v. Georgia* (1976), 428 U.S. 153 [96 S. Ct. 2909, 49 L.Ed.2d 859] and *Profitt v. Florida* (1976), 428 U.S. 242 [96 S. Ct. 2960, 49 L.Ed.2d 913]. The requirements of R.C. 2929.03(F) that a court or panel explain its reasoning is an integral part of a meaningful review.

"The Ohio Supreme Court has examined the question of a trial court's omission of an R.C. 2929.03(F) explanation in *State v. Maurer, supra,* and found in that case that the error was harmless. The court reasoned that the statutorily mandated independent review of capital sentencing by both the court of appeals and by the [S]upreme [C]ourt provides, in certain circumstances, a sufficient substitute for the sentencing court's explanation so that an appellant need not be prejudiced. It is critical to the instant case to note, however, that the *Maurer* court specifically limited its holding on this issue to the facts of that case. Indeed the *Maurer* court accompanied its holding with a strong caveat:

"' * * * we do not intend to trivialize the duty of the trial court under R.C. 2929.03(F) to articulate its reasoning or to suggest that such an omission is insignificant. It is not. The failure of a trial court to comply with this aspect of R.C. 2929.03(F) disrupts the review procedures enacted by the General Assembly by depriving the defendant and subsequent reviewing courts of the trial court's perceptions as to the weight accorded all relevant circumstances. In a closer case, those perceptions could make a difference in the manner in which a defendant pursues his appeal and in which a

reviewing court makes its determination.' *Maurer* [*supra,* 15 Ohio St. 3d], at 247 [15 OBR at 386, 473 N.E.2d at 778].

"For two reasons, I believe the instant appeal is that 'closer case' to which the *Maurer* court referred. First, I believe that, although there are many similarities between appellant's crime and that of Maurer, the two cases are factually distinguishable. Maurer confessed to and was convicted of the kidnap, sexual assault and murder of a seven year old girl. In his confession Maurer stated that he picked up his victim at her school and drove her to a secluded area. After stopping the car, Maurer and his victim went into a woods. Maurer took a shot gun with him. Once in the woods Maurer attempted to sexually molest the girl, shot her to death, then secreted the body.

"Maurer was indicted, tried, and convicted of aggravated murder with an R.C. 2929.04(A)(7) specification, kidnapping, and gross sexual imposition. During the sentencing phase Maurer presented for mitigation evidence that he was of low intelligence, an alcoholic, and possessed a borderline personality disorder. He was a high school drop out discharged for bad conduct from the U.S. Marine Corp[s]. Friends testified that when he drank he became loud, boisterous and likely to start fights. He had twice completed programs for alcoholism. While Maurer did not have a lengthy criminal record, he had served a short term of imprisonment for grand theft. He was on probation at the time of his offense.

"Maurer's jury recommended the death penalty. The trial court, as discussed above, concluded the aggravating circumstance of which Maurer was convicted outweighed mitigating factors, adopted the jury's recommendation, and sentenced Maurer to death. The Ohio Supreme Court, in its independent review, concluded that, while Maurer did not have a lengthy prior criminal record, he was on probation for a previous criminal conviction at the time of his offense and

thus gave no weight to an R.C. 2929.04(B)(5) mitigating factor. The Ohio Supreme Court also concluded that Maurer's alcoholism and other problems were no different than the problems encountered by many others who were not criminals, let alone murderers. The court thus found no mitigating circumstances.

"The unique circumstances of Richard Fox are well discussed in the majority opinion. My own weighing of the aggravating and mitigating elements of this case appears in Part III. For this section, it is sufficient to note that until one reaches the conclusory portion of the majority's independent evaluation, Richard Fox appears to be a good father and an asset to his community. If we are to credit the testimony of the psychiatric experts, Fox's act of violence seems to be the result of an undetected and untreated personality disorder, the cumulative dimension of which led to the death of Leslie Keckler. This is a far closer call than *Maurer*. This is exactly the type of case alluded to by the *Maurer* caveat.

II.

"Exacerbating my concern for the trial panel's failure to articulate its reasoning are comments contained in the body of the trial panel's opinion. From the language contained therein, it appears that the trial panel utilized inappropriate factors to negate mitigation.

"At the conclusion of the trial panel's discussion of appellant's mitigating factors appears a summary paragraph which recites the conclusion that the panel afforded due consideration of appellant's personality traits as formed by his family life. The panel states it considered his education, his religious and other experiences, as well as his personality disorders. The final sentence of the paragraph states:

"'The panel also took note of the manner in which he planned and executed the events that eventually led to the kidnapping and violent murder of the victim.'

"From the quoted sentence above, an inference can be drawn that the panel has gone outside the sentencing statute to create a judge-made aggravating factor which the panel then uses to counterbalance all of the mitigating evidence submitted; that factor being the 'violent' murder. Once this factor is used to negate mitigation, then the uncountered weight of the aggravating circumstance of which appellant was convicted prevails. This is inappropriate. R.C. 2929.03(D)(2) permits the panel to weigh only the aggravating factor for which the appellant was tried and convicted. The panel may not select and consider other aggravating factors which were not included in the indictment and verdict. Additionally, such an amorphous, semi-articulated extra-statutory aggravating factor is surely less concrete than the 'vile, horrible or inhuman circumstance' found overbroad in *Godfrey v. Georgia, supra,* or the 'depravity of mind' or 'especially heinous, atrocious, or cruel' found to be unconstitutionally vague. *Deutsher v. Whitley* (C.A.9, 1991), 946 F.2d 1443, 1446-1447; *Maynard v. Cartwright* (1988), 486 U.S. 356, 359 [108 S. Ct. 1853, 1857, 100 L.Ed.2d 372, 379].

"Additionally, it is also inappropriate for the trial panel to consider appellant's 'plann[ing].' The psychiatric testimony clearly showed that appellant planned his attempt to deceive the victim, but that he had not planned to commit a murder. In any case, appellant's planning was not the aggravating circumstance of which he was convicted. R.C. 2929.04[B][7], the aggravating circumstance of which appellant was convicted, is stated in the alternative. The murder is aggravated when it is committed during the course of a kidnapping and the offender was the principal offender in the commission of the aggravated murder, *or* when the murder was committed with prior calculation and design. [Emphasis *sic.*] Appellant was indicted and convicted of being a principal offender, not of committing murder with prior calculation and design.

"From the language of the trial panel's opinion there appears to be a likelihood that the panel misapplied the statutory balancing of aggravating circumstance and mitigating factors. Unfortunately, we do not know if this was the case because the trial panel erred by failing to articulate its reasoning pursuant to R.C. 2929.03(F).

"Unlike *State v. Maurer, supra,* the weighing of Richard Fox's aggravating circumstance against his mitigating factors appears to be a close call. As such, I believe the trial court's error to be prejudicial to him. On this issue alone I believe a remand for new sentencing proceedings is in order. [Footnote omitted.]

III.

"In addition to the legal concerns expressed above, I have, as required by R.C. 2929.05, conducted my own examination of the facts of the case to determine whether the sole aggravating circumstance outweighs the mitigating factors. In so doing, I cannot conclude that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

"Unlike the trial court, I do not feel that virtue is its own reward. The trial court held that appellant's previous good deeds and community involvement were entitled to little weight in mitigation. I, on the other hand, find a previous life of providing benefit to the community to be worthy of extraordinary consideration. Criminal penalties are not imposed privately, but as a function of society. Government has the right to govern, and to mete out criminal penalties, by the consent of the governed. In this case, the trial court held that appellant's assistance in community events was a factor which should have 'allowed him to be able to follow the laws of our society.' The trial panel then accorded little weight in mitigation to this factor. Are we to presume that the trial panel would have more seriously considered mercy if

appellant had voluntarily been a burden to society all of his life?

"The trial panel gave little account to the testimony regarding appellant's personality disorder. The judgment of the panel describes this condition more like a character flaw than a medical condition. Contrary to the conclusion of the trial panel, the testimony does *not* show that appellant merely had an excessive sense of self-worth. The testimony showed, instead, that appellant suffered from a debilitating inability to live with his own lack of self-worth and that he compensated by fantasizing himself as a quite special person—one of great importance. Dr. Sherman testified that appellant was so horrified by his own lack of worth that he created a fantasy so extreme that he could avoid recognizing reality. Appellant lacked the usual defense mechanisms that the mentally healthy enjoy.

"In my view, the evidence clearly established that appellant suffered from a personality disorder that altered his perception of reality and led directly to the commission of this murder. I agree with the majority and the trial court that this condition is not within the scope of R.C. 2929.04(B)(3) despite the testimony that appellant was 'unable' to control his rage. However, I consider it to be of substantial weight as an 'other' mitigating factor under R.C. 2929.04(B)(7).

"The record in this case convinces me of additional substantial mitigating factors. For instance, there was testimony that appellant had a positive impact on the life and development of his daughter, Jessica, even while he was in jail awaiting trial. Witnesses, including family members and a minister (appellant's future brother-in-law, Jerry Wiles), opined that appellant would continue to be a positive force in Jessica's life. This innocent child has already suffered the death of her mother and the imprisonment of her father. She is likely to have a difficult life. Appellant's death cannot bring back Leslie Keckler. But, appellant's death at the hands of the

state most assuredly will have a negative impact on the child, Jessica. I find that future benefits that appellant's life may present to her by way of lessening the effects of the past and perhaps improving the future to be a mitigating factor.

"I find that the evidence establishes yet another mitigating factor not discussed by the majority or the trial panel. Three sheriff's deputies testified that appellant was a fine inmate and 'a good man.' The mere fact that an inmate convicted of a capital offense is able to obtain the favorable testimony of his jailors is in itself unusual. The testimony of the deputies was supplemented by the opinion of Jerry Wiles, who anticipated that appellant not only would continue to be a cooperative inmate, but that he would ultimately be a useful force within the prison community. Wiles formed this opinion while ministering to appellant in the county jail. If 'mitigating' is broadly defined as reasons not to take a life, then the potential for having a more tranquil influence on the prison community is mitigating.

"Because of the legal errors made during the punishment phase of the trial and for reason of my own independent evaluation of the aggravating circumstance and mitigating factors, I would vacate appellant's sentence of death and remand to the trial court for purpose of imposing life imprisonment pursuant to R.C. 2929.05."

A WILLIAM SWEENEY, J., concurs in the foregoing opinion.

Court of Appeals of Ohio, Sixth District, Wood County.

STATE of Ohio, Appellee,

v.

Richard FOX, Appellant.

No. 90WD0067.

Aug. 7, 1992.

OPINION AND JUDGMENT ENTRY

MELVIN L. RESNICK, Judge.

This is an appeal from the Wood County Court of Common Pleas, wherein a three-judge panel found appellant, Richard E. Fox guilty of one count of aggravated murder with one death penalty specification and one count of kidnapping. Fox was sentenced to death.

I.

A.

In early May 1989, Marla Ritchey applied for a job as a waitress at the Sundance Restaurant in Bowling Green, Ohio. A few days later she received a call from someone inviting her to a job interview at the Holiday Inn in Bowling Green. On May 8, 1989, Ritchey went to the lobby of the Holiday Inn for her interview. A man approached her and introduced himself as "Jeff Bennett." Ritchey saw that the man had a copy of her Sundance application on his clipboard. The man told her that his day had been hectic and that he had not finished all of his business. He asked Ritchey if she would accompany him on his business route so they could discuss the job. Ritchey agreed and got into his car.

As they were driving, the man explained that he was a representative for a company called "Great American Foods."

He stated that the company did business with restaurants in the Northwest Ohio area and that they were interested in hiring a new company representative. He pulled into the parking lot of a bar called "Gamers" and stopped the car. He handed Ritchey a list of medical benefits supposedly included with the job and went inside of the bar. When he returned a few minutes later, Ritchey questioned him about the specifics of the job. The man answered vaguely, quickly changing the subject. He asked her if she thought she was dressed appropriately for the interview. He told her that he thought her skirt was too long. He then started the car and told her they would go back to the Holiday Inn to further discuss the job. Instead of returning in the direction they had come from, the man proceeded down a back road. Having decided that the interview was a hoax, Ritchey became alarmed and contemplated jumping out of the moving car. Nevertheless, they did return to the Holiday Inn parking lot where the man stopped the car. Ritchey explained that she was not interested in the job. The man asked her what she would do if someone pulled a knife on her and asked her for all of her money or asked her to do "other things." At that point, Ritchey did jump out of the car. The man attempted to grab for her and told her to come back. As Ritchey ran for her car, the man immediately pulled away.

Ritchey reported the incident to the police providing a description of the man and his car. As a result, the police compiled a composite drawing of a suspect.

B.

On September 14, 1989, eighteen-year-old Leslie Renee Keckler walked into the Bob Evans Restaurant in Bowling Green to apply for a job. Keckler sat at the restaurant's counter where she filled out an application. On that day, appellant, Richard Fox, was employed as grill cook at the restaurant. Restaurant manager, Ronald E. Laney, had Keckler's completed application in his hand when he was

approached by Fox. Fox told Laney that he thought he recognized Keckler and he asked Laney for her name. Laney held up the application, pointed to her name and said "[H]er name is Leslie Keckler. Do you know her?" Fox answered no.

Keckler subsequently told family and friends that she had a job interview scheduled for September 26, 1989, at the Holiday Inn in Bowling Green. She told her mother, Linda Dunlap Wilson of Arcadia, Ohio, that the interview was with a man who had a sales route that he wanted to relinquish. The job was supposedly for a restaurant sales position that paid five dollars an hour plus commission. If hired, she would supply Bowling Green restaurants with restaurant supplies. Keckler's mother remembered that her daughter was very excited about the interview. Mike Crego, Keckler's boyfriend, remembered that Keckler expected the September 26 interview for a sales position to last approximately three hours. Keckler told Crego she would be going over her possible sales route during the interview. On the evening of September 26, Holiday Inn restaurant manager Holly Beaverson saw Keckler sitting on a couch in the lobby of the motel. Beaverson asked Keckler if she could be of assistance. Keckler answered no and explained that she was waiting for someone. According to Beaverson, Keckler was in the lobby approximately fifteen minutes. Beaverson did not see Keckler leave the Holiday Inn.

Early on the morning of September 27, Crego called Keckler's mother to inform her that her daughter had never returned home from the interview. A missing person's report on Keckler was filed with the Bowling Green Police Department on September 27.

On September 28, 1989, Investigator John Helm interviewed Marla Ritchey regarding the composite of "Jeff Bennett" that had been compiled in May 1989. The prior incident at the Holiday Inn involving Ritchey seemed relevant

to the Keckler investigation. Ritchey had not been satisfied with the original composite drawing so she assisted Helms in its revision. The revised composite was completed on September 29, and was later released to the local media.

On September 30, 1989, Keckler's body was found in a ditch on the west side of Pargillis Road in Wood County. The coroner reported her immediate cause of death as ligature strangulation complicated by multiple stab wounds.

On October 2, 1989, Richard Kinsman went to the Bowling Green Police Department and identified the revised composite drawing as his former friend, Richard Fox of Tontogony, Ohio. A follow up computer check on Fox revealed that he had previously been involved in an incident at a local pizza store with a female job applicant. The police prepared a search warrant for the residence of Richard Fox.

On October 2, 1989, Detective Thomas Brokamp and Investigator Helm went to Fox's residence. Fox agreed to voluntarily go with the officers to the Bowling Green Police Department. It was there that Fox signed a waiver of his Miranda rights. Fox admitted to being the man that Marla Ritchey had met at the Holiday Inn. Fox also told the officers that he had seen Keckler enter the Bob Evans Restaurant on September 14 and that he had spoken to her about working at the restaurant. He stated that he met with Keckler at the Holiday Inn on September 26 and that later that evening they met by chance at the Woodland Mall in Bowling Green. They decided to go for a drive and she got into his car. They drove for a while and then parked on Liberty Hi Road in Wood County. According to Fox, "things started getting hot." Keckler got mad at Fox, called him an "asshole" and started to get out of the car. Fox pulled her back in and stabbed her approximately five times. He then got a rope out of his trunk and strangled her to "make sure she was dead." Fox then drove to Pargillis Road and left her body in a ditch.

C.

On October 4, 1989, Fox was indicted for the aggravated murder of Leslie Keckler with a specification that the offense was committed while Fox was committing or attempting to commit the offense of kidnapping and that Fox was the principal offender. Fox was also indicted on one count of kidnapping. On May 3, 1990, a three-judge panel found Fox guilty on both counts and the specification. Fox's counsel requested a mental examination of Fox pursuant to R.C. 2929.03(D). Following a mitigation hearing, the three-judge panel found beyond a reasonable doubt that the aggravating circumstance that Fox was found guilty of committing outweighed any of the mitigating factors presented to the court. The panel imposed the death penalty for the aggravated murder offense and a concurrent sentence of ten to twenty five years incarceration for the offense of kidnapping. On appeal, Fox now asserts the following seven assignments of error:

> "1. The trial court erred to the prejudice of appellant when it failed to find the existence of a mitigating factor pursuant to R.C. Section 2929.04(B)(3), and, thereby failed to properly weigh mitigation evidence against the single aggravating circumstance proved at the trial.
>
> "2. The trial court erred to the prejudice of the appellant by combining the R.C. Section 2929.04(B)(3) mitigating factor with evidence of appellant's social development which was introduced to establish how the personality disorder evolved and which constitutes a separate mitigating factor under R.C. Section 2929.04(B)(7).
>
> "3. A *de novo* review of the evidence used to establish the single aggravating circumstance proved at trial and weighing same against the mitigating factors established by the record reveals that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt. This court must vacate the sentence of death and remand the case for re-sentencing pursuant to Section 2929.06, Ohio Revised Code.

"4. The Prosecuting Attorney denied the appellant his rights to due process of law and trial by a fair and impartial jury by his misconduct in responding to appellant's request for discovery by placing appellant's statement admitting the murder on the public record in the office of the Clerk of Courts.

"5. The trial court abused his [*sic*] discretion and erred to the prejudice of the appellant by overruling his motion to change the venue of the trial.

"6. The trial court erred to the prejudice of the appellant by overruling his motion to dismiss the indictment.

"7. The trial court erred to the prejudice of the appellant by overruling his objection to setting a retired judge on the trial panel."

This court will review Fox's death sentence pursuant to the three-pronged test set out in R.C. 2929.05(A). First, we must address appellant's assignments of error. Second, we must independently weigh the aggravating circumstances in this case against any factors which mitigate against imposition of the death penalty. Third, we must independently consider whether Fox's sentence is disproportionate to the penalty imposed in similar cases. For the reasons set forth below, we affirm the judgment of the court of common pleas and uphold the sentence of death.

II.

R.C. 2929.04 provides in pertinent part as follows:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment * * * and proved beyond a reasonable doubt.

" * * *

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit *kidnapping*, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

If the above aggravating circumstance is proven beyond a reasonable doubt, the jury or panel of three judges shall consider and weigh against the aggravating circumstance the nature and circumstances of the offense, the defendant's history, character and background and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

> "(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death." R.C. 2929.04(B).

Fox contends in his first assignment of error that the three-judge panel erred in failing to find a mitigating factor pursuant to R.C. 2929.04(B)(3), which, once again, states:

> "(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

Three experts who had examined Fox testified at his sentencing hearing. Psychologist, Dr. Newton Jackson, testified that Fox suffered from a severe personality disorder characterized by extreme loneliness and feelings of low self-worth. To escape, Fox frequently engaged in fantasies of living a different life. Dr. Jackson agreed that Fox did not suffer from a mental disease or defect that would render him incapable of appreciating right from wrong or from conforming his behavior. Psychiatrist, Dr. Thomas Sherman, testified that Fox suffered from a narcissistic personality disorder which caused Fox to be extremely bitter and jealous of other people. He didn't have many friends and his relationships with women were disturbed. Fox engaged in grandiose fantasies, many of them about women. Dr. Sherman also testified that Fox did not suffer from a mental disease or defect that would render him incapable of appreciating right from wrong. Clinical psychologist, Barbara McIntyre, testified that Fox seemed to have problems controlling his anger. He was also plagued with negative attitudes and low self-esteem. Dr. McIntyre testified that Fox suffered from a personality disorder which is not the same thing as a mental disease or defect that would prevent him from appreciating right from wrong and conforming his behavior.

In its sentencing opinion, the three-judge panel stated "[t]here is evidence that the defendant suffers from a personality disorder. This, however, was not of a nature as to deprive the defendant of the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

Although R.C. 2929.04(C) allows a defendant great latitude in the presentation of evidence supporting mitigating factors, the panel is not required to accept everything offered by the defendant as mitigating. *State v. Steffen* (1987), 31 Ohio St. 3d 111, 129. The panel may properly choose to assign no weight to the defendant's evidence if it considers it non- mitigating. *Id.* In sum, the weight to be given mitigating evidence is within the panel's discretion. *State v. Mills* (1992), 62 Ohio St. 3d 357, 376. The Supreme Court of Ohio addressed this issue in *State v. Van Hook* (1988), 39 Ohio St. 3d 256. In *Van Hook,* the defendant was found guilty of aggravated murder with one death penalty specification. After a sentencing hearing, the three-judge panel determined that no mitigating factor pursuant to R.C. 2929.04(B)(3) existed. The panel cited the overwhelming weight of professional testimony which revealed that the defendant had a borderline personality disorder that is *not* the product of a mental illness or disease which would have prevented him from distinguishing right from wrong or from conforming his conduct to the requirements of the law. In reviewing the defendant's argument that the panel erroneously determined that no R.C. 2929.04(B)(3) mitigating factor existed, the Supreme Court described the panel's conclusion as "reasonable" and "fully justified."

As in *Van Hook,* the panel's finding in this case, that no mitigating factor existed pursuant to R.C. 2929.04(B)(3), was amply supported by the evidence and well within the court's discretion in determining the weight to be given to the mitigation evidence. Accordingly, Fox's first assignment of error is found not well-taken.

Fox contends in his second assignment of error, that the panel erroneously considered mitigating factors under R.C. 2929.04(B)(7) when weighing the R.C. 2929.04(B)(3) mitigating factors. At the mitigation hearing, defense counsel presented extensive evidence on Fox's background and childhood development. Fox contends that the panel erroneously considered this evidence when deciding whether or not Fox "lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" under R.C. 2929.04(B)(3). The effect of this error, Fox contends, was to diminish the weight properly afforded to the background evidence as a mitigating factor under R.C. 2929.04(B)(7).

Mitigating factors under R.C. 2929.04(B)(7) are "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."

"Under R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." *State v. Stumpf* (1987), 32 Ohio St. 3d 95, paragraph one of the syllabus. See, also, *State v. Jells* (1990), 53 Ohio St. 3d 22, 33, and *State v. Rojas* (1992), 64 Ohio St. 3d 131, 142.

Reviewing the R.C. 2929.04(B)(7) mitigating factors, the panel, in its decision, specifically discussed in sufficient detail the background evidence that was presented at the mitigating hearing. In any event, the panel was under no obligation to assign any particular weight to the background evidence. *State v. Wiles* (1991), 59 Ohio St. 3d 71, 91, citing *State v. Cooey* (1989), 46 Ohio St. 3d 20, 39-40. Accordingly, appellant's second assignment of error is found not well-taken.

Fox contends in this third assignment of error that this court's *de novo* review will reveal that the aggravating circumstance of kidnapping proved at trial does not outweigh

the mitigating factors beyond a reasonable doubt. This issue will be addressed in our independent review found in Part III of this opinion.

Fox contends in his fourth assignment of error that he was denied his due process right to a fair trial. Specifically, Fox contends that the prosecutor improperly responded to defense counsel's request for discovery by filing Fox's confession to the murder with the Wood County Clerk of Courts. This allowed the media access to the confession. Consequently, Fox contends, there was an inordinate amount of adverse pretrial publicity regarding his guilt. In response, the prosecutor contends that it is a long-standing practice in his office to file discovery with the clerk's office. The prosecutor cites two reasons for this practice: (1) to protect against defense accusations that the state had failed to comply with discovery; and (2) to assure that a detailed record is available for appellate review.

Crim.R. 16 provides as follows:

"DISCOVERY AND INSPECTION

"* * *

"(B) Disclosure of Evidence by the Prosecuting Attorney. (1) Information Subject to Disclosure.

"(a) Statement of Defendant or Co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to

inspect the copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

"(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

"(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

"(iii) Recorded testimony of the defendant or co-defendant before a grand jury."

Documents filed with the clerk of courts become public record and are accessible to the media. R.C. 149.43(A)(1) and (B). Crim.R. 16 is silent as to whether a prosecutor may respond to a discovery request by filing the requested documents with the clerk of courts. However, because of the obvious danger adverse pretrial publicity presents to an accused's constitutional right to a fair and impartial trial, we strongly disapprove of the Wood County prosecutor's office practice of filing requested discovery documents with the clerk of courts. A preferable practice for the prosecutor's office would be to file a "certificate of discovery compliance" certifying that the prosecutor has complied with discovery. In the event that the prosecutor's compliance is challenged, opposing counsel can raise the issue by filing a motion to compel.

Although we find error in the method by which the prosecutor responded to discovery, we find the same harmless beyond a reasonable doubt. Fox was tried by a three-judge panel rather than a jury vulnerable to media influences. A three-judge panel is presumed to consider only relevant and competent evidence in arriving at a judgment. *State v. Davis* (1992), 63 Ohio St. 3d 44, 48, citing *State v. Wickline* (1990), 50 Ohio St. 3d 114, 122; *State v. White* (1968), 15 Ohio St. 2d 146, 151. Moreover, the record in this case contains overwhelming proof of Fox's guilt. *State v. Williams* (1988), 38 Ohio St. 3d 346, 350. Accordingly, Fox's fourth assignment of error is found not well-taken.

Fox contends in his fifth assignment of error that the trial court abused its discretion in overruling Fox's motion to change venue. Fox contends that adverse pretrial publicity

prevented him from being tried before a fair and impartial jury.

Under Crim.R. 18(B), a trial court is obligated to change venue "when it appears that a fair and impartial trial cannot be held in the court * * *." The examination of jurors on voir dire provides the best test of whether adverse pretrial publicity has prevented a defendant from obtaining a fair and impartial jury in the community. *State v. Maurer* (1984), 15 Ohio St. 3d 239, 250-251, citing *State v. Swiger* (1966), 5 Ohio St. 2d 151, paragraph one of the syllabus. A good faith effort should be made to impanel a jury in the absence of a clear and manifest showing by the defense that pretrial publicity has made seating a jury impossible. *State v. Herring* (1984), 21 Ohio App.3d 18. Ultimately, the decision to change venue rests within the sole discretion of the trial court. *State v. Mills, supra*, at 363-364, citing *State v. Maurer, supra,* and *State v. Fairbanks* (1972), 32 Ohio St. 2d 34, 37.

A two day pre-trial hearing was held on Fox's motion to change venue. The defense submitted numerous local newspaper articles and video tapes of local newscasts on the Fox case. Local media personnel were called to testify on their coverage of the case. The defense also presented the testimony of an expert who surveyed Wood County residents on their knowledge of the case. In the end, the trial court denied the motion finding that the pretrial publicity had not been so pervasive and prejudicial as to require a change of venue. The court further stated that a good faith effort should now be made to impanel a jury. However, the court reserved for Fox the following right: "If during voir dire, but prior to the final swearing of the jury, the defendant feels a change of venue is required then he may again move for a change of venue at that time." Approximately one month later on March 2, 1990, Fox waived his right to trial by jury and elected to be tried by a three-judge panel. Consequently, no attempt to seat a jury was ever made.

Although this case received a large amount of pretrial publicity, it must be recognized that "an important case can be expected to arouse the interest of the public in the vicinity * * *." *State v. Landrum* (1990), 53 Ohio St. 3d 107, 117; citing *Irvin v. Dowd* (1961), 366 U.S. 717, 722. Based on the foregoing, we agree with the trial court that the publicity was not so pervasive or prejudicial as to require a change of venue before an attempt was made to seat a jury. Accordingly, Fox's fifth assignment of error is found not well-taken.

Fox contends in his sixth assignment of error that the trial court erred in overruling his motion to dismiss the indictment. In support, Fox refers us to the arguments presented in his October 24, 1990 Memorandum in Support of his motion to dismiss the indictment wherein Fox challenges the constitutionality of Ohio death penalty.

However, the Ohio Supreme Court recently stated "[w]e have repeatedly rejected the arguments raised by counsel and have held the death penalty statute constitutional in all respects." *State v. Evans* (1992), 63 Ohio St. 3d 231, 253-254; citing *State v. Lott* (1990), 51 Ohio St. 3d 160; *State v. Poindexter* (1988), 36 Ohio St. 3d 1; *State v. Jenkins* (1984), 15 Ohio St. 3d 164.

We now turn to the merits of Fox's sixth assignment of error. A motion to dismiss an indictment tests the sufficiency of the indictment without regard to the quality or quantity of evidence that may be produced by the state. *State v. Patterson* (1989), 63 Ohio App.3d 91, 95. The proper determination is whether the allegations contained in the indictment make out offenses under Ohio criminal law.

The indictment reads as follows:

> "In Wood County, Ohio, Richard E. Fox did:
>
> "Count 1: On or about the 26th day of September, 1989 purposely, cause the death of Leslie Renee Keckler while committing or attempting to commit or while fleeing

immediately after committing or attempting to commit the offense of kidnapping a violation of Ohio Revised Code Title 29, Section 2905.01 thus in violation of Section 2903.01 of the Revised Code and against the peace and dignity of the State of Ohio.

"SPECIFICATION: The Grand Jurors further find and specify that the offense was committed while the said Richard E. Fox was committing, or attempting to commit the offense of kidnapping, and the said Richard E. Fox was the principal offender in the commission of the aggravated murder.

"Count 2: On or about the 26th day of September, 1989 did by force, threat or deception, remove Leslie Renee Keckler from the place where she was found, or restrain her of her liberty, with purpose to engage in sexual activity as defined in Section 2907.01 of the Revised Code with Leslie Renee Keckler against her will, or to terrorize, or inflict serious physical harm on the said Leslie Renee Keckler."

The above indictment sets out an offense for kidnapping under R.C. 2905.01 which proscribes a person from removing another "by force, threat or deception" " * * * from the place where he is found or restrain him for his liberty, for * * * " the purpose of engaging "in sexual activity, as defined in Section 2907.01 of the Revised Code with the victim against his will;" The indictment also sets out an offense for aggravated murder under R.C. 2903.01 which proscribes anyone from purposely causing "the death of another while committing or attempting to commit kidnapping, * * *." The indictment cumulatively subjects Fox to the penalty of death under R.C. 2929.02. Accordingly, we find no error in the court''s decision to overrule the motion to dismiss the indictment, and Fox's sixth assignment of error is found not well-taken.

In his final assignment of error, Fox contends that the trial court erred in overruling his objection to the seating of a retired judge on the three-judge panel.

On March 5, 1990, Fox waived his right to a jury trial and motioned the court to proceed with trial by a three-judge panel pursuant to R.C. 2945.06 which provides as follows:

> "Jurisdiction of judge when jury trial is waived; three-judge court.
>
> "* * *
>
> "If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court."

On March 9, 1990, the Wood County Clerk of Courts randomly drew the names of those judges provided by the Supreme Court of Ohio. The judges were contacted in the order in which they were randomly selected. The first two judges who indicated that they were available for the trial were the Honorable Randall L. Basinger, a common pleas judge from Putnam County, Ohio and the Honorable Robert V. Franklin, a retired judge from the Lucas County Court of Common Pleas. Both judges were officially assigned to the Fox case by Ohio Supreme Court Chief Justice, Thomas J. Moyer, on March 30, 1990.

We find no authority for Fox's proposition that a retired judge should not be assigned to a death penalty panel. We defer to the Guidelines For Assignment of Judges announced by Chief Justice Moyer on May 24, 1988. The Guidelines read in pertinent part:

> "General Guidelines.

"1. The Ohio Constitution and the Ohio Revised Code vest the Chief Justice with the authority to make assignments in whatever circumstances he or she deems appropriate. While these Guidelines may impose specific duties upon other persons, the Chief Justice may waive compliance with any Guidelines to assist the exercise of that discretion.

" * * *

"The term 'retired judge' means any person who voluntarily retired from judicial service on any Ohio court, including (1) any person who served until he or she was ineligible to seek continued service by reason of constitutional or statutory age limitations, and (2) any person who was elected to and served on an Ohio court without being defeated in an election for new service or continued service on that court.

" * * *

"14. * * * any active or retired judge who wishes to receive assignments shall annually file a report provided by Administrative Director of the Supreme Court, which shall include the number of years of judicial experience in each court where the judge has served.

" * * *

"17. The Chief Justice may assign any retired judge who wishes to serve, subject to constitutional and statutory limitations:

"a. A retired judge may be assigned to the court where he or she served before retirement, to any other court to which the judge could have been assigned while a sitting judge, and to any court provided by constitutional and statutory authority.

"b. A retired judge shall not be assigned while he or she is engaged in the full-time or part-time practice of law.

For this purpose, the practice of law does not include, among other activities, service with or without compensation as an adjudicator for submissions or referrals pursuant to R.C. 2701.10.

"c. A retired judge shall not be assigned unless he or she has completed and reported the judicial education required by the Rules for the Government of the Judiciary.

"d. The judge shall not be assigned unless he or she is a resident or elector of Ohio.

"e. The judge shall not be assigned unless he or she has paid all current registration fees and otherwise has good standing as a member of the bar.

" * * *

"23. Whenever feasible, a judge from a nearby county shall be utilized for assignment in order to economize on travel time as well as to minimize, if not eliminate, overnight expenses."

Based on the foregoing, the trial court did not err in overruling Fox's objection to the assignment of retired Lucas County Common Pleas Judge, the Honorable Robert V. Franklin. Fox's final assignment of error is found not well-taken.

III.

We now independently consider whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. The aggravating circumstance Fox was convicted of was committing a murder while committing, attempting, or fleeing immediately after committing or attempting to commit kidnapping. In our review we will consider the nature and circumstances of the offense, the history, character and background of the offender and the mitigating factors pursuant to R.C. 2929.04(B).

Eighteen witnesses were called by the defense to testify in mitigation of the evidence against Fox. Lela Fox, Richard Fox's mother, initially took the stand and testified to the following. In 1956 she was married to a man by the last name of Low. He died three weeks before his son, Richard [Fox] was born. After Richard's birth, Lela and the baby went to live with her parents, brother and two sisters. For the first couple of years of his life, Richard was showered with attention. Lela then met and married Dale Fox. Lela and Richard went to live with Fox. Lela changed her last name to Fox but Richard's last name remained Low at the request of his paternal grandparents who maintained an active role in his life. Lela and Dale Fox produced two daughters. This disappointed young Richard who was anticipating brothers. Richard and Dale Fox had a good relationship. Lela testified that Richard was an average student involved in little league, Boy Scouts and numerous church activities. When Richard was in the sixth grade he was frequently teased by other school children because his last name was different from his sisters. This greatly upset Richard so Dale immediately adopted him and Richard's last name was changed to Fox. Unfortunately, Richard's paternal grandparents did not approve of the name change and thereafter refused to speak to their grandson.

As an adult, he attended Owens Technical College and learned how to be a chef. He has consistently held a steady stream of minimum wage jobs in the food services industry. In 1980, he married and a daughter was born. His wife died in 1983, and Richard and his daughter returned to the Fox home to live. In 1989, Richard became engaged to a woman the Fox family was not fond of. When the engagement broke off, Richard became despondent.

Lela Fox described her son as loving, kind, caring and generous. She testified that he was probably a bit jealous of his younger sisters who got better grades than he. When asked what she would have done differently in the rearing of

Richard, Lela responded that she would have had him adopted by Dale Fox sooner and she would have attended more of his childhood sports activities. Lela testified that Richard's life should be spared "if for no other reason," than for his young daughter.

Richard's twenty-four year old sister, Mary Lou Fox, testified that Richard was very upset over his broken engagement in 1989. Mary Lou testified that she regretted not being more supportive of her brother at that time. She also testified that Richard was jealous of her and their sister since one sister had obtained a pharmacy degree and the other sister was in the process of obtaining her pharmacy degree. Mary Lou testified that Richard often felt like a "third wheel" in the family since his sisters were so close. Mary Lou testified that Richard always expressed a great deal of love for his daughter and took the time to teach her many things. Dale Fox, Richard's adoptive father, testified that all through his life Richard had been a valued member of the family. He attended school, church and work faithfully. Dale Fox testified that his job kept him away from home a great deal of the time when Richard was growing up and that he wished he had spent more time with Richard when he was younger.

Numerous friends of Richard Fox and his family testified on his behalf. This testimony revealed that Fox was a well-liked, responsible member of his community. One witness testified that as a child, Fox seemed to be an "all American kid." The associate pastor of Fox's church and Fox's future brother-in-law testified that Fox was very remorseful over what had happened to Keckler. Almost all of the witnesses testified that they had never heard anything negative about Fox until the murder in 1989.

Two Wood County sheriff's deputies testified that Richard Fox was one of the more cooperative, well-behaved inmates in the Wood County Jail.

Dr. Newton L. P. Jackson, a forensic psychologist, gave the following testimony based on his interviews with Richard Fox. Jackson believed that the Keckler murder resulted from Richard Fox's severe personality disorder which developed at an early age. As a young child, Fox suffered early trauma in the form of severe allergies which caused him to be intolerant of most foods. He never learned to trust anyone when he was young. He also never went through the normal process of learning about relationships with the opposite sex. Although he received a great deal of love from his parents, he never felt as if he belonged anywhere or that anyone truly understood him. He felt extremely lonely inside and greatly feared that love from others would be withdrawn. In response to these feelings, Fox became a "very good boy." He gave an outward appearance that everything was fine in his life while inside he was desperately craving affection. Because he was able to outwardly exhibit normal personality traits, the people around him were unable to detect his severe personality disorder. As an adult, Fox hated himself and created a fantasy world to shield himself from his belief that he had no self-worth. He imagined himself as more powerful, stronger and smarter than he really was. He then became very boastful of the traits he fantasized about. Fox wanted to have a satisfying relationship with a woman but he was too psychologically crippled to establish such a relationship. Dr. Jackson testified that in his opinion, Fox did not have a desire to hurt other people. Rather, his desire was to exert control over people and gain their respect.

Intelligence tests administered by Dr. Jackson showed Fox to be of low, average intelligence. Fox testified that the tests showed that Fox had trouble processing ideas and thoughts. He also had trouble understanding human interactions.

With regard to the murder, Jackson summarized that when Keckler called Fox an "asshole," it was essentially the "last straw." With nowhere to retreat, he erupted in rage

against Keckler as almost a symbol of the injuries and slights he had sustained and repressed throughout his life.

Psychiatrist Thomas Sherman testified that in his opinion, Fox was psychiatrically abnormal. Dr. Sherman explained that Fox had failed to develop the fundamental personality functions that allow us to relate to others or to make reasonable conclusions. Fox frequently engaged in grandiose fantasies about himself to account for his seriously low self-esteem. Sherman testified that in 1989, Fox had reached a point in his life where he was no longer satisfied with fantasizing so he began to act out his fantasies with women. This led to the incidents with Marla Ritchey and Keckler. Sherman testified that in his opinion, Fox's initial intent was to dominate or threaten Keckler rather than to kill her.

Richard Fox in an unsworn statement expressed remorse for his crime and sympathy for Keckler's family. He told the court that he felt relief when he was arrested "as if someone was finally coming to help me." He asked that his life be spared so that he can help others avoid the mistakes he has made.

As to the statutory mitigating factors, there is no evidence that Keckler induced or facilitated the offense within the meaning of R.C. 2929.04(B)(1), nor does the evidence suggest that Fox was under duress, coercion or strong provocation as described in R.C. 2929.04(B)(2). Three experts concluded that Fox was not suffering from a mental disease or defect which would preclude him from appreciating the criminality of his conduct. Therefore, R.C. 2929.04(B)(3) does not apply. Fox was thirty-four years of age at the time of the offense so his youth is not a mitigating factor pursuant to R.C. 2929.04(B)(4). R.C. 2929.04(B)(6) does not apply to this case since Fox was the sole offender rather than a participant. R.C. 2929.04(B)(5) is entitled to some weight since Fox has no history of prior criminal convictions or delinquency adjudications. Mitigating factors entitled to weight under R.C.

2929.04(B)(7) include Fox's personality disorder coupled with his other psychological problems, his remorse and his overall cooperative nature. However, these factors weigh minimally. As Justice Sweeney wrote in the death penalty case of *State v. Dickerson* (1989), 45 Ohio St. 3d 206, 218, "[I]t takes no citation of authority to state that many other people have endured similar [difficult] experiences without resort to lawlessness."

Fox purposely used deception to lure two young women into his control. When Marla Ritchey realized that she was the victim of a cruel hoax, she was lucky enough to get away from Fox as he grabbed for her. Leslie Keckler was not so lucky. When she attempted to get away from Fox, he brutally stabbed and strangled her to death and left her body in a rural ditch. We therefore find that the aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt. Furthermore, Fox's third assignment of error is found not well-taken.

Our final task is to determine if the death sentence imposed in this case is excessive or disproportional to the penalty imposed in similar cases. This review should be limited to cases already decided by the reviewing court in which the death penalty has been imposed. *State v. Steffen, supra,* paragraph one of the syllabus.

In 1984, this court affirmed a lower court's death sentence in *State v. Rogers* (Mar. 10, 1984), Lucas App. No. L-82-344, unreported. Although Rogers' death sentence was ultimately reversed on the basis of a later United States Supreme Court case, [FN1] the *Rogers* case remains the only case from this district in which this court imposed a death penalty for an aggravated murder conviction with the specification that the murder was committed in the course of a kidnapping. Rogers was convicted of two specifications pursuant to R.C. 2929.04(A)(7), that the aggravated murder of a seven year old girl was committed while appellant was

committing, or attempting to commit, kidnapping and rape. Rogers was found to be mildly mentally retarded with a history of alcoholism and a lengthy criminal record. Although the aggravating circumstances in *Rogers* were arguably more serious, the mitigating factors in Fox's case were far less weighty. We find that the imposition of the death penalty is not excessive or disproportionate to that imposed in the *Rogers* case.

> FN1. The Ohio Supreme Court affirmed this court's 1984 decision in *State v. Rogers* (1985), 17 Ohio St. 3d 174. The United States Supreme Court vacated the judgment and remanded the case for further review in light of *Caldwell v. Mississippi* (1985), 472 U.S. 320. *Rogers v. Ohio* (1985), 474 U.S. 1002. Roger's death sentence was ultimately reversed and the case remanded in *State v. Rogers* (1987), 32 Ohio St. 3d 70.

Nor is the death sentence imposed in this case excessive or disproportional to sentences imposed for other kidnapping/murder convictions. See *State v. Jells, supra; State v. Brewer* (1990), 48 Ohio St. 3d 50, *State v. Morales* (1987), 32 Ohio St. 3d 252; *State v. Buell* (1986), 22 Ohio St. 3d 124.

IV.

In conclusion, we find that the evidence presented sustained the finding of an aggravating circumstance in this case, that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt, that the sentence of death imposed upon appellant, Richard E. Fox, was appropriate in this case, and that the sentencing court properly so determined.

On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial, and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant, Richard E. Fox, has an automatic appeal

to the Ohio Supreme Court pursuant to R.C. 2929.05. For that reason we order the clerk of this court to file a copy of this opinion with the clerk of the Ohio Supreme Court within fifteen days of the issuance of this opinion in accordance with R.C. 2929.05(A). We further order a continuance of the stay of execution of sentence previously granted by this court on October 24, 1990, pending appeal to the Ohio Supreme Court. Costs to abide final determination by the Supreme Court of Ohio.

JUDGMENT AFFIRMED.

ABOOD and MELVIN L. RESNICK, JJ.

SHERCK, J., concurs in part and dissents in part as follows.

SHERCK, Judge, concurring in part and dissenting in part.

I concur in part and I dissent in part. I concur with the majority's treatment of those assignments of error concerning appellant's trial. I believe the defendant was properly found guilty. However, I dissent from the majority opinion as that opinion relates to the imposition of the death penalty. For the reasons stated below, I would reverse the death penalty and remand to the trial court for the purpose of imposing a life sentence pursuant to R.C. 2929.05.

In reviewing the penalty phase of the trial, I believe the trial court improperly considered certain evidence as an aggravating circumstance and failed to articulate, pursuant to the requirements of R.C. 2929.03(F), why the aggravating circumstance is sufficient to outweigh the mitigating factors.

I.

R.C. 2929.03(F) provides that on imposition of a death sentence the court or the panel of three judges:

> " * * * shall state in a separate opinion its specific findings as to [statutory] mitigating factors, * * * other mitigating factors, the aggravating circumstances the

offender was found guilty of committing, *and the reasons why the aggravating circumstances* the offender was found guilty of committing were sufficient to *outweigh the mitigating factors.* * * * " (Emphasis added).

In the instant case the panel of judges prepared a separate opinion discussing the single aggravating circumstance found and the mitigating factors presented by appellant. In the portion of its opinion entitled "Why the Aggravating Circumstance is Sufficient to Outweigh The Mitigating Factors" the court summarily concluded that upon consideration of the evidence, " * * * the aggravating circumstance sufficiently outweighed the mitigating factors presented in this case." [FN1] It is clear to me that such an entry fails to satisfy the statutory requirement of R.C. 2929.03(F).

FN1. Reproduced in its entirety this section is as follows:

"Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, the statement of the offender, arguments of counsel, and the mental report submitted pursuant to R.C. 2929.03(D)(1), the panel found, by proof beyond a reasonable doubt, that the aggravating circumstance sufficiently outweighed the mitigating factors present in this case. The panel, in compliance with R.C. 2929.03(D)(3) and after full deliberations, unanimously imposed the death sentence."

The purpose of the statutory requirement that a trial court and reviewing courts articulate the mental processes by which the decision to impose the death penalty was made is that this procedure provides a final opportunity for the decisionmaker and reviewing courts to expunge their reasoning of inappropriate matters. See R.C. 2929.05. For example, a sentence predicated on an aggravating circumstance that the murder was outrageously or wantonly vile, horrible, or inhuman is overbroad, because it does not sufficiently distinguish a case from others where death sentences were not

imposed. *Godfrey v. Georgia* (1980), 446 U.S. 420. The logic being that, " * * * a person of ordinary sensibility could fairly conclude that virtually every murder is outrageously or wantonly vile, horrible, or inhuman." *State v. Maurer* (1984), 15 Ohio St. 3d 239, 242, certiorari denied 472 U.S. 1012, rehearing denied 473 U.S. 924. Even the reasoning of seasoned jurists may lapse to the arbitrary or capricious when faced with a senseless killing. This is the reason capital sentencing schemes must be designed to channel the discretion of the sentencing body. See *Zant v. Stephens* (1983), 462 U.S. 862, 874-878; *Wainright v. Goode* (1983), 464 U.S. 78, 87, rehearing denied 465 U.S. 1014.

The gravity and the finality of the death penalty commands that at each juncture the decision making process be examined and reexamined to assure that this sanction is not imposed arbitrarily or disproportionately. For this reason, sentencing statutes which provide for a balance of clear and concrete aggravating and mitigating factors and incorporate meaningful appellate review are favored. *State v. Maurer, supra,* at 246 citing *Gregg v. Georgia* (1976), 428 U.S. 153 rehearing denied 429 U.S. 875, and *Profitt v. Florida* (1976), 428 U.S. 242. The requirements of R.C. 2929.03(F) that a court or panel explain its reasoning is an integral part of a meaningful review.

The Ohio Supreme Court has examined the question of a trial court's omission of an R.C. 2929.03(F) explanation in *State v. Maurer, supra,* and found in that case that the error was harmless. The court reasoned that the statutorily mandated independent review of capital sentencing by both the court of appeals and by the supreme court provides, in certain circumstances, a sufficient substitute for the sentencing court's explanation so that an appellant need not be prejudiced. It is critical to the instant case to note, however, that the *Maurer* court specifically limited its holding on this issue to the facts of that case. Indeed the *Maurer* court accompanied its holding with a strong caveat,

> " * * * we do not intend to trivialize the duty of the trial court under R.C. 2929.03(F) to articulate its reasoning or to suggest that such an omission is insignificant. It is not. The failure of a trial court to comply with this aspect of R.C. 2929.03(F) disrupts the review procedures enacted by the General Assembly by depriving the defendant and subsequent reviewing courts of the trial court's perceptions as to the weight accorded all relevant circumstances. In a closer case, those perceptions could make a difference in the manner in which a defendant pursues his appeal and in which a reviewing court makes its determination." *Maurer* at 247.

For two reasons, I believe the instant appeal is that "closer case" to which the *Maurer* court referred. First, I believe that, although there are many similarities between appellant's crime and that of Maurer, the two cases are factually distinguishable. Maurer confessed to and was convicted of the kidnap, sexual assault and murder of a seven year old girl. In his confession Maurer stated that he picked up his victim at her school and drove her to a secluded area. After stopping the car, Maurer and his victim went into a woods. Maurer took a shot gun with him. Once in the woods Maurer attempted to sexually molest the girl, shot her to death, then secreted the body.

Maurer was indicted, tried, and convicted of aggravated murder with an R.C. 2929.04(A)(7) specification, kidnapping, and gross sexual imposition. During the sentencing phase Maurer presented for mitigation evidence that he was of low intelligence, an alcoholic, and possessed a borderline personality disorder. He was a high school drop out discharged for bad conduct from the U.S. Marine Corp. Friends testified that when he drank he became loud, boisterous and likely to start fights. He had twice completed programs for alcoholism. While Maurer did not have a lengthy criminal record, he had served a short term of

imprisonment for grand theft. He was on probation at the time of his offense.

Maurer's jury recommended the death penalty. The trial court, as discussed above, concluded the aggravating circumstance of which Maurer was convicted outweighed mitigating factors, adopted the jury's recommendation, and sentenced Maurer to death. The Ohio Supreme Court, in its independent review, concluded that, while Maurer did not have a lengthy prior criminal record, he was on probation for a previous criminal conviction at the time of his offense and thus gave no weight to an R.C. 2929.04(B)(5) mitigating factor. The Ohio Supreme Court also concluded that Maurer's alcoholism and other problems were no different than the problems encountered by many others who were not criminals, let alone murderers. The court thus found no mitigating circumstances.

The unique circumstances of Richard Fox are well discussed in the majority opinion. My own weighing of the aggravating and mitigating elements of this case appears in Part III. For this section, it is sufficient to note that until one reaches the conclusory portion of the majority's independent evaluation, Richard Fox appears to be a good father and an asset to his community. If we are to credit the testimony of the psychiatric experts, Fox's act of violence seems to be the result of an undetected and untreated personality disorder, the cumulative dimension of which led to the death of Leslie Keckler. This is a far closer call than *Maurer*. This is exactly the type of case alluded to by the *Maurer* caveat.

II.

Exacerbating my concern for the trial panel's failure to articulate its reasoning are comments contained in the body of the trial panel's opinion. From the language contained therein, it appears that the trial panel utilized inappropriate factors to negate mitigation.

At the conclusion of the trial panel's discussion of appellant's mitigating factors appears a summary paragraph which recites the conclusion that the panel afforded due consideration of appellant's personality traits as formed by his family life. The panel states it considered his education, his religious and other experiences, as well as his personality disorders. The final sentence of the paragraph states: "The panel also took note of the manner in which he planned and executed the events that eventually led to the kidnapping and violent murder of the victim."

From the quoted sentence above, an inference can be drawn that the panel has gone outside the sentencing statute to create a judge-made aggravating factor which the panel then uses to counter balance all of the mitigating evidence submitted; that factor being the "violent" murder. Once this factor is used to negate mitigation, then the uncountered weight of the aggravating circumstance of which appellant was convicted prevails. This is inappropriate. R.C. 2929.03(D)(2) permits the panel to weigh only the aggravating factor for which the appellant was tried and convicted. The panel may not select and consider other aggravating factors which were not included in the indictment and verdict. Additionally, such an amorphous, semi-articulated extra-statutory aggravating factor is surely less concrete than the "vile, horrible or inhuman circumstance" found overbroad in *Godfrey v. Georgia, supra,* or the "depravity of mind" or "especially heinous, atrocious, or cruel" found to be unconstitutionally vague. Deutsher v. Whitley (C.A.9, 1991), 946 F.2d 1443, 1446-1447. *Maynard v. Cartwright* (1988), 486 U.S. 356, 359.

Additionally, it is also inappropriate for the trial panel to consider appellant's "plann[ing]." The psychiatric testimony clearly showed that appellant planned his attempt to deceive the victim, but that he had not planned to commit a murder. In any case, appellant's planning was not the aggravating circumstance of which he was convicted. R.C. 2929.04(07),

the aggravating circumstance of which appellant was convicted, is stated in the alternative. The murder is aggravated when it is committed during the course of a kidnapping and the offender was the principal offender in the commission of the aggravated murder *or,* when the murder was committed with prior calculation and design. Appellant was indicted and convicted of being a principal offender, not of committing murder with prior calculation and design.

From the language of the trial panel's opinion there appears to be a likelihood that the panel misapplied the statutory balancing of aggravating circumstance and mitigating factors. Unfortunately, we do not know if this was the case because the trial panel erred by failing to articulate its reasoning pursuant to R.C. 2929.03(F).

Unlike *State v. Maurer, supra,* the weighing of Richard Fox's aggravating circumstance against his mitigating factors appears to be a close call. As such, I believe the trial court's error to be prejudicial to him. On this issue alone I believe a remand for new sentencing proceedings is in order. [FN2]

FN2. In other instances where a statute requires an explanation of a decision where a court fails to so explain we must reverse and remand. *State ex rel. Nolly v. Industrial Comm.* (1991), 57 Ohio St. 3d 203; *State ex rel. Albright v. Industrial Comm.* (1992), 63 Ohio St. 3d 739. I see no reason to except capital cases from this rule.

III.

In addition to the legal concerns expressed above, I have, as required by R.C. 2929.05, conducted my own examination of the facts of the case to determine whether the sole aggravating circumstance outweighs the mitigating factors. In so doing, I cannot conclude that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

Unlike the trial court, I do not feel that virtue is its own reward. The trial court held that appellant's previous good deeds and community involvement were entitled to little weight in mitigation. I, on the other hand, find a previous life of providing benefit to the community to be worthy of extraordinary consideration. Criminal penalties are not imposed privately, but as a function of society. Government has the right to govern, and to mete out criminal penalties, by the consent of the governed. In this case, the trial court held that appellant's assistance in community events was a factor which should have "allowed him to be able to follow the laws of our society." The trial panel then accorded little weight in mitigation to this factor. Are we to presume that the trial panel would have more seriously considered mercy if appellant had voluntarily been a burden to society all of his life?

The trial panel gave little account to the testimony regarding appellant's personality disorder. The judgment of the panel describes this condition more like a character flaw than a medical condition. Contrary to the conclusion of the trial panel, the testimony does *not* show that appellant merely had an excessive sense of self-worth. The testimony showed, instead, that appellant suffered from a debilitating inability to live with his own lack of self-worth and that he compensated by fantasizing himself as a quite special person—one of great importance. Dr. Sherman testified that appellant was so horrified by his own lack of worth that he created a fantasy so extreme that he could avoid recognizing reality. Appellant lacked the usual defense mechanisms that the mentally healthy enjoy.

In my view, the evidence clearly established that appellant suffered from a personality disorder that altered his perception of reality and led directly to the commission of this murder. I agree with the majority and the trial court that this condition is not within the scope of R.C. 2929.04(B)(3) despite the testimony that appellant was "unable" to control

his rage. However, I consider it to be of substantial weight as an "other" mitigating factor under R.C. 2929.04(B)(7).

The record in this case convinces me of additional substantial mitigating factors. For instance, there was testimony that appellant had a positive impact on the life and development of his daughter, Jessica, even while he was in jail awaiting trial. Witnesses, including family members and a minister (appellant's future brother-in-law, Jerry Wiles), opined that appellant would continue to be a positive force in Jessica's life. This innocent child has already suffered the death of her mother and the imprisonment of her father. She is likely to have a difficult life. Appellant's death cannot bring back Leslie Keckler. But, appellant's death at the hands of the state most assuredly will have a negative impact on the child, Jessica. I find that future benefits that appellant's life may present to her by way of lessening the effects of the past and perhaps improving the future to be a mitigating factor.

I find that the evidence establishes yet another mitigating factor not discussed by the majority or the trial panel. Three sheriff's deputies testified that appellant was a fine inmate and "a good man." The mere fact that an inmate convicted of a capital offense is able to obtain the favorable testimony of his jailors is in itself unusual. The testimony of the deputies was supplemented by the opinion of Jerry Wiles, who anticipated that appellant not only would continue to be a cooperative inmate, but that he would ultimately be a useful force within the prison community. Wiles formed this opinion while ministering to appellant in the county jail. If "mitigating" is broadly defined as reasons not to take a life, then the potential for having a more tranquil influence on the prison community is mitigating.

Because of the legal errors made during the punishment phase of the trial and for reason of my own independent evaluation of the aggravating circumstance and mitigating factors, I would vacate appellant's sentence of death and

remand to the trial court for purpose of imposing life imprisonment pursuant to R.C. 2929.05.

[Filed June 27, 1990]

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

State of Ohio
Plaintiff,

Case No. 89-CR-325

vs

Verdict and Sentence

Richard E. Fox
Defendant.

In compliance with R.C. 2929.03 (D)(1) this cause came on for hearing the 25th day of June 1990 on the mitigation phase of the trial of the above named defendant. The defendant was represented by Peter T. Halleck and John J. Callahan. State of Ohio was represented by Alan R. Mayberry and David Woessner. The trial judge panel consisting of the three undersigned judges heard and considered all of the relevant evidence raised at the trial, all other evidence presented at this hearing, including the testimony and reports of mental examinations submitted pursuant to R.C. 2929.03 (D)(1).

The defendant, Richard E. Fox, was found guilty beyond a reasonable doubt on May 3, 1990, of Count One of the Indictment, Aggravated Murder, R.C. 2903.01 (B), to wit: that on or about September 26, 1989 and in Wood County, Ohio, that Richard E. Fox did purposely and with specific intent cause the death of another, to wit: Leslie Renee Keckler, while committing or attempting to commit, a kidnapping, R.C. 2905.01. Richard E. Fox, was also found guilty beyond a reasonable doubt of the specification contained in Count One, to wit: that pursuant to R.C. 2929.04 (A)(7) Richard E. Fox purposely and with specific intent caused the death of Leslie Renee Keckler while he was

committing or attempting to commit a kidnapping, R.C. 2905.01, and that Richard E. Fox was the principal offender in the commission of the Aggravated Murder.

The judges considered and weighed against the aggravating circumstance that Richard E. Fox was convicted of committing beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of Richard E. Fox and all of the mitigating factors enumerated in R.C. 2929.04 (B)(1) thru (7) and (C).

The panel of three judges unanimously finds beyond a reasonable doubt that the aggravating circumstance Richard E. Fox was found guilty of committing outweighs any mitigating factors opposed to it.

In compliance with R.C. 2929.03, the three judge panel unanimously imposes upon the defendant Richard E. Fox, the sentence of death.

It is Ordered, Adjudged and Decreed that for a violation of R.C. 2905.01, Kidnapping, an aggravated felony of the first degree, as charged in the second count of the indictment, the defendant is Ordered committed to the Department of Rehabilitation and Corrections of the State of Ohio where he will serve a sentence of not less than ten nor more than twenty-five years to be served concurrently with the sentence imposed this date for the offense of Aggravated Murder.

Defendant to pay costs of prosecution. Execution is awarded for costs.

_____ _____

Judge Donald A. DeCessna DATE

_____

Judge Robert V. Franklin

_____

Judge Randall L. Basinger

[Filed: June 27, 1990]

**IN THE COURT OF COMMON PLEAS,
WOOD COUNTY, OHIO**

State of Ohio — **Case No. 89-CR-325**

Plaintiff, — **OPINION OF TRIAL JUDGES IN A CAPITAL CASE R.C. 2929.03(F)**

V

Richard Fox — **The Honorable Donald A. DeCessna, Randall L. Basinger, Robert V. Franklin**

Defendant.

: : : : : : :

The Defendant, Richard Fox, was indicted on October 4, 1989 for aggravated murder in violation of R.C. 2903.01 (B) with a kidnapping specification, and was also indicted for Kidnapping in violation of R.C. 2905.01. The defendant waived trial by jury. The trial before a three judge panel began on April 30, 1990 and lasted four days.

On May 3, 1990 the panel returned verdicts of guilty as to both aggravated murder with the specification, and kidnapping.

Sentencing Proceedings

The sentencing stage of the bifurcated trial began on June 25, 1990 and lasted two days. The panel received testimony from 19 witnesses, as well as the unsworn statement of the defendant. Eighteen witnesses were called by the defendant, one was called by the State. The panel also

received into evidence the mental examination report made at the defendant's request pursuant to R.C. 2929.03(D)(1), (joint exhibit A).

Mitigation Factors

The panel of three judges considered and weighed against the aggravating circumstance proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender, and the seven factors listed in R.C. 2929.04(B) and discussed below.

(1) "Whether the victim of the offense induced or facilitated it;"

The defendant, while kidnapping her, had driven the victim several miles out into the country.

There was no evidence presented to suggest that the victim in any way induced or facilitated her murder.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;"

The only evidence at trial that the victim did or said anything relating to her kidnapping and/or murder, was a statement to the investigating officer, by the defendant, that the victim called him an "asshole." Under the circumstance that this statement was allegedly made, this was not considered strong provocation and there was no evidence of duress or coercion.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;"

At the mitigation hearing, testimony was heard from Dr. Newton Jackson, a psychologist, and Dr. Thomas

Sherman, a psychiatrist, both called by the defense, and Dr. Barbara McIntire, a clinical psychologist, called by the prosecution. A mental examination report, (Joint exhibit A), made pursuant to R.C. 2929.03(D)(1), prepared by the Court Diagnostic and Treatment Center, was admitted. The panel found that the defendant had substantial capacity to appreciate the criminality of his conduct, and that the defendant was able to conform his conduct to the requirements of law. There is evidence that the defendant suffers from a personality disorder. This, however, was not of a nature as to deprive the defendant of the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. This personality disorder is discussed under (7) (infra).

(4) "The youth of the offender;"

The defendant was a mature man of 34 years of age at the time of the offense. He had earned an associate college degree. Therefore no weight was given to this factor.

(5) "The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;"

It was stipulated by counsel that the defendant had no prior criminal convictions or delinquency adjudications. This mitigating factor was given due consideration and weight by the panel.

(6) "If the offender was a participant in the offense but not the principal offender *** ;"

The defendant was the sole participant in the kidnapping and murder of the victim. As such, this is not a mitigating factor in this case.

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death;"

Most of the evidence before the panel falls under this category.

As noted above there was medical testimony that the defendant suffers from a personality disorder. The defendant has an excessive sense of self worth and an unrealistic appraisal of his ability indicative of a Narcissistic Personality. The defendant had difficulty in building relationships with others and with making reasonable conclusions concerning day to day social activities. The defendant had a great deal of envy and hostility for others due to his inabilities. The defendant especially had a difficult time relating to women. As the mental examination report indicates, he saw them as both desirable but rejecting him, and as "perfect" and as "whores." The defendant's psychiatric problems, and his confused image of himself and the world around him were considered by the Court to be mitigating factors.

The greatest amount of testimony was given concerning the defendant's general good character and strong family background.

The defendant came from a loving family. Although his natural father died before the defendant was born, the defendant was raised in a strong family environment.

The defendant was adopted at age 12 by Dale Fox. The defendant was and remains very close to his parents, his half-sisters, and his daughter.

The defendant was also shown to have good character traits. He attended church on a regular basis, sang in the church choir and attended and assisted in community events. The testimony of three deputy sheriffs shows that the defendant, while waiting in the county jail for trial in this case, was a model prisoner.

With such a strong family and religious background it appears the defendant has been given an environment which should have allowed him to be able to follow the laws of our

society. As such this factor was given little weight in mitigation.

The defendant has gone from job to job as a chef. Each of his jobs paid just above minimum wage. The defendant never made as much money as he desired to support himself and his daughter on their own; so the defendant and his daughter, after the death of his wife, lived with his mother and father. The defendant was of low average intelligence. The defendant had a difficult time accepting the fact that he was not adopted by Dale Fox until age 12 and that while growing up his father's job required him to spend several days a week away from home. Further, the defendant felt he did not receive as much attention as his half-sisters and he was jealous of their successes. The defendant's wife died in 1983 and this also caused him some distress, since he, along with his mother and father, became the primary caretaker of his daughter, who is now age 7.

The panel took note of the personality traits of the defendant as formed by his family life, religion, education and experiences and his personality disorders and gave due weight to all of these factors. The panel also took note of the manner in which he planned and executed the events that eventualy led to the kidnapping and violent murder of the victim.

The Aggravating Circumstance

The defendant committed aggravated murder while the defendant was committing or attempting to commit, or fleeing immediately after committing, or attempting to commit kidnapping. Pursuant to R.C. 2929.04(7), kidnapping, the aggravating circumstance in this case, was proved beyond a reasonable doubt.

Why the Aggravating Circumstance

is Sufficient to Outweigh The Mitigating Factors

Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, the statement of the offender, arguments of counsel, and the mental report submitted pursuant to R.C. 2929.03(D)(1), the panel found, by proof beyond a reasonable doubt, that the aggravating circumstance sufficiently outweighed the mitigating factors present in this case. The panel, in compliance with R.C. 2929.03 (D)(3) and after full deliberations, unanimously imposed the death sentence.

Judge Donald A. DeCessna

Judge Randall L. Basinger

Judge Robert V. Franklin

C E R T I F I C A T I O N

This is to certify that a copy of the foregoing Order was mailed or delivered to Alan R. Mayberry, Wood County Prosecuting Attorney, and Peter T. Halleck and John J. Callahan, counsel for defendant and the Wood County Sheriff.

_____ _____

DATE

JUL 12 2002
OFFICE OF THE CLERK

No. 01-1754

In The Supreme Court Of The United States

RICHARD E. FOX,

Petitioner,

v.

RALPH COYLE, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Fox was tried, convicted and sentenced to death in Ohio for the 1989 kidnapping and murder of Leslie Keckler. By his choice, the case was heard by a three-judge panel rather than a jury.

Every state and federal court to examine Fox's case since his trial twelve years ago has agreed that the death sentence was properly imposed on him. None of the four questions in his petition warrants review here, for he simply alleges that Ohio's courts – and later, the federal courts – ignored settled law in his particular case. Even were those kind of claims appropriate for review in this Court, the opinions of the state supreme court and other courts along the way do not support the spin that Fox gives them.

Fox does not challenge Ohio's capital sentencing scheme, does not show how the opinion of the circuit court of appeals conflicts with opinions from other circuits, and does not show why arguments that numerous state and federal courts have examined repeatedly should now be examined yet again here. The petition should be denied.

REASONS FOR DENYING THE WRIT

I. The First Question Raises Nothing Beyond A Claim Of Lower-Court Error, And The Record Does Not Support The Claim In Any Event.

No one doubts that state courts in capital cases must carefully distinguish between aggravating circumstances and mitigating evidence. No state or federal court below has suggested otherwise. The point is so unremarkable that the district court and the Sixth Circuit declined to grant a certificate of appealability to petitioner Fox when he argued

below that the state supreme court misapplied state law concerning aggravating factors and mitigating evidence.

Even apart from the fact that the circuit court of appeals below did not review the argument that Fox raises in his first question, that question identifies for this Court nothing beyond an alleged misapplication of settled law in this one case. There is no conflict among the circuit courts of appeals on the question, for none of the cases cited in the Petition at 13 say anything that conflicts with the approach that Ohio courts follow in capital cases. As Fox himself notes, the relevant Ohio statute requires the trial jury or panel of judges to weigh all mitigating factors against the aggravating circumstances, Pet. at 10-11, and he certainly does not suggest that the Ohio statute itself runs afoul of the Eighth or Fourteenth Amendments.

What Fox *does* say is that in his particular case, the state supreme court made a mistake. But he does not challenge the state *trial* court's entirely proper identification of the single aggravating circumstance that existed in this case: the fact that Fox committed a murder during the course of a kidnapping, Pet. App. at 161a. The Ohio law in effect at the time of Fox's crime treated that kind of kidnapping-murder combination as an aggravating circumstance, see O.R.C. 2929.04(A)(7), and that circumstance was proven by the government beyond a reasonable doubt, according to the state trial court. Pet. App. at 161a.

The trial court also rightly weighed against that one aggravating circumstance the various mitigating factors that Fox presented during the sentencing phase of his trial. Pet. App. at 158a-161a. Fox's argument supporting his first question offers no criticism at all of the way that the state trial court reached its decision to impose a death sentence, and the trial court's opinion on the point is straightforward and unremarkable.

In reviewing the trial court's judgment, both the state court of appeals, Pet. App. at 138a-143a, and the state supreme court, Pet. App. at 109a-111a, then reweighed the mitigating factors against the sole aggravating circumstance, just as Ohio law demands. Ohio law in effect at the time of Fox's trial called for the trial court – and any higher courts reviewing the judgment on appeal – to weigh as mitigating factors the "history, character, and background of the offender," as well as "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." O.R.C. 2929.04(B) and (B)(7).

The state court of appeals and the supreme court did just that. True enough, the state supreme court gave Fox's "steady employment, favorable character testimony and lack of a prior criminal record . . . only modest weight" as mitigating factors. Pet. App. at 111a. But just because Fox feels that those factors should have worked more strongly in his favor certainly does not mean that the Ohio high court violated the Constitution in ruling as it did.

Most importantly, the state supreme court did *not* describe Fox's "history, character, and background," O.R.C. 2929.04(B), as *aggravating* factors. See Pet. App. at 110a (explaining that "Fox's history, character and background are entitled to weight in mitigation"). Nothing in Ohio's laws – let alone in the Constitution – compelled the state supreme court to draw any particular conclusions about the mitigating evidence that Fox presented. The court was to consider the mitigating evidence, and it did so. The court was to weigh that evidence against the aggravating circumstance, and it did that also. And the court was to affirm the death sentence imposed by the trial court only if satisfied "by proof beyond a reasonable doubt . . . that the aggravating circumstances . . . outweigh the mitigating factors." O.R.C. 2929.03(D)(3). The state supreme court did exactly that. Pet. App. at 109a-111a.

For all of those reasons, the first question in the petition does not warrant review. Fox cites no flaw in Ohio law or even in the procedures that the trial court followed in sentencing Fox to death. As for the issue that Fox *does* allege, nothing about the Ohio Supreme Court's handling of the mitigation evidence suggests that that court misapprehended the distinction between aggravating circumstances on the one hand and mitigating factors on the other. The particular mitigating evidence that Fox presented to the trial court was entitled to "some weight" according to the state supreme court, Pet. App. at 110a, but in the end the court found that "the aggravating circumstance outweighs [the] mitigating factors, even when the mitigating factors are considered in their entirety." Pet. App. at 111a. That straightforward application of settled law to particular facts did not warrant the issuance of a certificate of appealability in the district court or the circuit court of appeals, and it does not warrant review here.

II. Neither The Parties Nor The Courts Are Divided On The Second Question In The Petition.

Petitioner Fox claims that the Court should decide in this case whether his effort to secure review of the first question now is timely, or whether instead he should have filed a petition for certiorari within 90 days after the court of appeals denied his certificate of appealability on the question back in October of 2000. We see no need for the Court to address that issue in this case, however, for we do not disagree with the prisoner-friendly view of the law that Fox urges the Court to adopt.

We have never argued that his cert. petition raising the first question ought to have been filed (if at all) long ago, and we do not challenge his right to present the question at this time along with his other questions that challenge the

final judgment of the court of appeals. For all of the sensible policy reasons that Fox explains on page 18 of his Petition, we agree that habeas petitioners should raise any challenges to a circuit court's denial of a certificate of appealability at just the time that Fox himself has chosen to raise his: when the court of appeals has issued a final judgment denying habeas relief to the prisoner on any claims that the circuit court of appeals *did* review on the merits.

That view gives prisoners the maximum amount of time within which to seek review of a circuit court's refusal to grant a COA on some issues, and Fox has taken full advantage of that extra time, bringing to this Court now both his first question in the Petition, as well as a separate application asking this Court to issue its own COA on that one issue. (No. A01-942, denied by Justice Stevens on 6/4/02). Again, we have no objection to Fox's decision to raise now in those two ways his challenge to the circuit court's October, 2000 action on the issue that Fox describes in his first question. In our view, nothing in this Court's rules, in 28 U.S.C. 1254 or in 28 U.S.C. 2101 (Pet. at 1-2) bars Fox from raising his first question now in his cert. petition. Because neither we nor any federal court has suggested a different view on the timing issue than the one that Fox lays out in his petition, and because that view is the most prisoner-friendly reading of the relevant statutes and rules, we see no reason for the Court to address the second question in Fox's cert. petition now.

III. The Courts Below Did Not Flout Settled Law In The Way That Fox Claims In His Third Question.

Fox suggests in his third question that the Ohio Supreme Court misapplied Ohio law when that court examined whether a death sentence was proper for Fox. As with the first question in the petition, this one does not focus on any recurring legal question of national importance, nor

any split among the circuit courts of appeals. Fox simply argues that the state courts and the federal courts all erred in their examination of the legality of his death sentence.

And as with the first question, the premise of Fox's third question – that Ohio's courts treated the circumstances of Fox's crime as an aggravating factor during the sentencing phase of his trial – is not borne out by the opinion of the state supreme court or those of the other courts that have examined Fox's sentence.

In fact, the state supreme court itself explained in its opinion that the only aggravating circumstances that may be considered by a court in Ohio are "those specifically enumerated in R.C. 2929.04(A)." Pet. App. at 107a. As that court said, "[r]eliance upon nonstatutory aggravating circumstances may constitute reversible error." Pet. App. at 107a-108a.

Fox takes the view that the state supreme court, having just explained that entirely correct view of the law in Ohio, then did exactly what the court itself had said cannot be done. That view is not supported by common sense, let alone by the state supreme court's opinion.

The Ohio high court explained that "[k]idnapping was the specified statutory aggravating circumstance" in Fox's case. Pet. App. at 108a. Neither we nor any state or federal court that has reviewed Fox's sentence has suggested otherwise. And the court said that a jury or trial court in an Ohio capital case "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." Pet. App. at 108a. That view is hardly remarkable, and is certainly consistent with this Court's own statements about the sentencing process in capital cases. Nothing in the Ohio Supreme Court's analysis

of the mitigating factors in Fox's case points toward the kind of "wholly arbitrary and capricious" sentencing procedure that we all agree is impermissible. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

This Court has in fact said directly that "the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty." *Tuilaepa v. California*, 512 U.S. 967, 976 (1994). That is all that the Ohio Supreme Court's opinion says as well, and the court added that a court's permissible decision to give little weight to mitigating factors in a particular case is not the same thing as a court's impermissible decision to treat that evidence as a "nonstatutory aggravating circumstance." Pet. App. at 108a. Ohio's courts did the former, not the latter, and the state supreme court said as much.

The Sixth Circuit agreed, finding that "[t]he planning and violence of the crime were neither weighed against the mitigating evidence nor used as aggravating circumstances" by the state supreme court. Pet. App. at 18a. According to the Sixth Circuit, "while the nature and circumstances of the crime may be considered, such factors may not be weighed against the mitigating circumstances, nor may they be included among the aggravating circumstances." *Id.* Nothing in the state supreme court's opinion says otherwise.

Had the state supreme court flouted Ohio law concerning the distinctions between aggravating circumstances and mitigating factors, or had that court said that the violence and the planning surrounding Fox's crime were themselves aggravating factors, then Fox's claim might warrant review. But in every court to examine the question, the conclusion has been that Ohio's courts followed Ohio law in deciding that Fox was eligible for the death penalty and that he deserved that penalty. The state and federal courts at

every level have stated the law correctly, and then have applied it correctly as well. The issue does not warrant another round of appellate review here.

IV. The Ohio Supreme Court Did Not Rely On A Separate Criminal Incident Involving Another Of Fox's Victims When That Court Affirmed Fox's Death Sentence.

Finally, Fox presents a question about the use by state courts of unproven criminal charges against defendants in the sentencing phase of capital cases. But the Ohio Supreme Court's opinion explaining that court's "independent reassessment" of Fox's death sentence does not even mention the uncharged incident described in Fox's fourth question. See Pet. App. at 109a-111a. The circuit court of appeals below observed as much. Pet. App. at 19a ("[O]ur own careful reading of the Ohio Supreme Court's independent reweighing of the aggravating and mitigating circumstances discloses no reliance on the Ritchey incident. Indeed, the Ohio Supreme Court does not mention the Ritchey incident.").

As the Sixth Circuit explained, the state supreme court's "independent examination of the aggravating and mitigating circumstances" of Fox's case without reference to the separate incident involving victim Marla Ritchey "thus cured any error that may have been introduced by the lower state court's reference" to that incident. Pet. App. at 19a. This Court has explained that just that kind of independent reweighing by a state supreme court can cure lower-court errors in the weighing process. See, e.g., *Clemons v. Mississippi*, 494 U.S. 738, 752-53 (1990) (finding no constitutional violation in a state supreme court's decision to apply harmless-error analysis when reviewing a lower court's consideration of an invalid aggravating circumstance);

Barclay v. Florida, 463 U.S. 939, 958 (1983) (plurality opinion) (same).

To be sure, if the trial court or the state supreme court had said that Fox's actions involving a different victim could be used as an aggravating circumstance in this case, or if those courts had said that that other incident could and should be thrown into the mix during the state courts' independent weighing or reweighing of the various aggravating and mitigating factors in this case, then the fourth question might warrant a closer look. Yet given that neither the trial court, Pet. App. at 157a-162a, nor the state supreme court, Pet. App. at 109a-111a, said either of those things, and given that neither court in fact made any mention of the separate Ritchey incident when those courts examined and reexamined the aggravating and mitigating evidence that the parties had presented in the trial court, this case hardly presents a sound vehicle for an examination of the fourth question.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 01-1754

IN THE
Supreme Court of the United States

RICHARD E. FOX,
Petitioner,
v.
RALPH COYLE,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After two rounds of briefing, it appears that the petition satisfies the customary criteria for granting review. It concerns "important question[s] of federal law," namely the jurisdictional time limits for seeking review of the partial denial of a certificate of appealability and the permissibility of using non-statutory aggravating factors to justify a capital sentence. It implicates a conflict in the lower courts over the permissibility of considering unadjudicated crimes during a capital-sentencing hearing. And it addresses questions both procedural and substantive that are recurring in nature, impact potentially all habeas litigants and in the end demand prompt resolution. The petition should be granted.

1. At no point does respondent raise, or even hint at, a procedural obstacle to reviewing the questions presented. No jurisdictional impediments exist, a final appealable order is in place, and there is no suggestion that Mr. Fox has waived or otherwise lost any of his arguments. Respondent's main point, it turns out, is that the decisions of the Sixth Circuit and Ohio Supreme Court are correct, a position that deserves the Court's full attention and consideration but not, we submit, until review has been granted.

2. Nor does respondent disagree with Mr. Fox over his interpretation of the procedures for seeking this Court's review of a circuit court's denial of a COA on some (but not all) issues. As set forth in his petition, Mr. Fox reads 28 U.S.C. § 2253(c) (requiring that an inmate receive a COA before appealing the denial of habeas relief) and 28 U.S.C. § 2101(c) (90-day deadline for filing a writ of certiorari) to mean that the jurisdictional time limit for filing a petition seeking review of any issue raised in a COA, including one for which a COA is denied, begins to run only after the appellate court's decision on the issues that it did agree to hear. At the same time, a plausible reading of these provisions and others suggests that a habeas litigant must seek this Court's review of the denied COA issues within 90 days of the final denial. Respondent, to its credit, agrees with Mr. Fox's reading of

these relevant provisions and does not dispute his interpretation. (*See* Resp. 5 ("we agree that habeas petitioners should raise any challenge to a circuit court's denial of a [COA] at just the time that Fox himself has chosen to raise his").)

3. Having agreed with Mr. Fox about the proper outcome of this unresolved and frequently recurring jurisdictional question, respondent nonetheless suggests that the parties' consensus means there is "no need for the Court to address that issue." Nothing could be further from the truth. Parties of course may not consent to the Court's jurisdiction where there is none. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) ("[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it."). Nor has the Court hesitated in the past to grant review of jurisdictional and other recurring federal questions merely because the parties agreed about the proper outcome. In *Hohn v. United States*, the Court agreed to resolve an open question on the Court's COA jurisdiction despite the fact that the "Government now found itself in agreement with [petitioner]," with "both [parties] argu[ing] in favor of our jurisdiction." 524 U.S. 236, 240-41 (1998); *see id.* ("The Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature. . . . [S]ince Hohn and the Government both argue in favor of our jurisdiction, we appointed an *amicus curiae* to argue the contrary position."). *See also Becker v. Montgomery*, 532 U.S. 757, 762 n.1 (2001) ("Without any party to defend the Sixth Circuit's position, we invited Stuart A. Baker to brief and argue this case, as *amicus curiae*, in support of the judgment below."); *Dickerson v. United States*, 530 U.S. 428, 442 n.7 (2000) ("Because no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited Professor Paul

Cassell to assist our deliberations by arguing in support of the judgment below.").

4. The explanation the State of Ohio gives for finding common ground with Mr. Fox also does not diminish the importance of the question. That the State approvingly finds Mr. Fox's reading to be "prisoner-friendly," (Resp. 4), and to "give[ ] prisoners the maximum amount of time within which to seek review of a circuit court's refusal to grant a COA on some issues," (Resp. 5), is of course good news for Mr. Fox. But what of a less-prisoner-friendly State? The whole point of bringing this issue to the Court's attention is that the pertinent statutes and rules by their terms do not answer it—a matter of particular concern to first-federal-habeas litigants like Mr. Fox. As things now stand, a habeas petitioner in Mr. Fox's shoes has two options once the circuit court denies the petitioner's COA on some (but not all) issues. The petitioner could file a certiorari petition within 90 days of the decision. Or the petitioner could gamble that the 90-day clock does not begin to tick until the circuit court rules upon the issues it did agree to hear. In the face of this ambiguity, all but the most risk-embracing practitioners will file a petition within 90 days of the COA partial denial. That may perhaps be unnecessary, but today no one can say for sure, not even respondent, who does not disagree that the issue remains unresolved. Under these circumstances, what should a capital-inmate's lawyer do? Recommend a protective certiorari petition? Or recommend that the capital defendant take a chance and wait? And what for that matter may the clerk's office say? On this record, it would seem highly dangerous to recommend anything but a protective motion. Whether one considers the vantage point of habeas claimants, government defendants, or the Court itself, all stand to benefit from guidance regarding the issue's appropriate resolution.

5. The State takes a different tack when it comes to the substantive errors committed by the lower courts. Mr. Fox's first question (upon which the lower courts did not even grant

a COA) addresses the Ohio Supreme Court's remarkable decision to convert statutory mitigating evidence into non-statutory aggravating evidence, then to use that mitigating evidence to justify a capital sentence. (Pet. 10-12.) The state court reached its decision to impose the death penalty after weighing against Mr. Fox's chances for life the facts that he "faced few challenges and little adversity in his life compared with many others," (Pet. App. 111a), and suffered from a mental disorder that "undercut any prospect of successful rehabilitation." (*Id.*) Unlike the approach innovated by the Ohio Supreme Court, this Court requires that each mitigating factor be considered as a mitigator, not as an aggravator. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record"). Transforming mitigating evidence into non-statutory aggravators offends Eighth and Fourteenth Amendment principles—and that is particularly true of evidence of a mental disorder. *See Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002) (barring use of the death penalty against the mentally disabled); *Stringer v. Black*, 503 U.S. 222, 237 (1992) ("[u]se of a vague or imprecise aggravating factor in the weighing process invalidates the sentence"); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that where an "aggravating circumstance at issue in this case had been invalid . . ., due process of law would require that the . . . decision to impose death be set aside"); (*see also* Pet. 11-12).

Respondent, for its part, agrees that the state courts must "weigh all mitigating factors against the aggravating circumstances." (Resp. 2.) And it suggests the state courts did just that, noting that the "state supreme court gave Fox's 'steady employment, favorable character testimony and lack of a prior criminal record . . . only modest weight' as mitigating factors." (Resp. 3 (citing Pet. App. 111a).) But that reading of the Ohio Supreme Court's decision fails to

account for the court's next statements regarding the "little adversity" Mr. Fox faced as well as the fact that his mental disorder "undercut" his chances at rehabilitation. The court's error in weighing this mitigating evidence against Mr. Fox is not, as respondent suggests, rehabilitated by a state court's treatment of other mitigating evidence. While respondent is correct that "[n]othing in Ohio's laws—let alone in the Constitution—compelled the state supreme court to draw any particular conclusions about the mitigating evidence that Fox presented," (Resp. 3), that is beside the point. The point is, the Ohio Supreme Court impermissibly used this evidence.

6. Nor can one accept at face value respondent's contention that the "state trial court's opinion on that score is straightforward and unremarkable." (Resp. 2.) Recall, as an initial matter, that the trial court violated Ohio law by not explaining its weighing analysis in the opinion. (Pet. App. 106a ("The trial court's opinion in this case causes us to once again admonish trial courts to carefully comply with every specific statutory requirement in R.C. 2929.03(F)."). This required the Ohio Supreme Court to conduct its own independent reweighing, and ultimately is what led to the improper use of mitigating evidence. Indeed, other lower courts require a precise weighing of mitigating factors against aggravating factors, not a haphazard approach that twists one into the other. *See Williams v. Cain*, 125 F.3d 269, 282 (5th Cir. 1997) (In a weighing state, the sentencer must "place the statutory aggravating factors on one side of the scale and all of the mitigating evidence on the other, and . . . balance one side against the other before imposing the death penalty."); (Pet. 13-14).

Legal commentators also have been quick to point out that sentencers may, "and sometimes do, improperly weigh mitigating factors on the side of aggravation, altering the proper balance between aggravating and mitigating factors in a particular case and depriving defendants of what the United States Supreme Court has declared to be their constitutional

right to have each mitigating factor considered 'as a mitigating factor.'" Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 Hastings L.J. 409, 410 (1990); *see also* Note, *Mental Illness As An Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 304 (1989) ("[I]f a court allows mitigating mental illness evidence to aggravate the defendant's punishment, the aggravating factors will no longer fulfill their role of channeling sentence discretion. Aggravating factors are supposed to help a sentencer separate out criminals most deserving of death from offenders who are less culpable."). The decision warrants review or at a minimum the grant of a COA.

7. Petitioner's third question also goes largely unanswered by respondents. The Ohio Supreme Court, in authorizing Mr. Fox's death sentence, relied on the "manner in which [Fox] planned and executed the events that led to the kidnapping and murder." (Pet. App. 108a.) In that court's eyes, those circumstances included the "considerable effort and planning [that] apparently went into the kidnapping. Fox lured a vulnerable eighteen year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her." (Pet. App. 110a-111a; *see also* Pet. 19-23.) By any measure, the decision to weigh these non-statutory aggravating factors against Mr. Fox's chance at life jeopardized the legitimacy of his death sentence. *See Barclay v. Florida*, 463 U.S. 939, 956-57 (1983).

Rather than resolving the constitutional tensions in the lower courts' decisions, respondent's brief serves only to highlight them. The State agrees (Resp. 6) that Ohio courts may not rely upon nonstatutory aggravating circumstances. But nothing in the State's capital sentencing statute allows for consideration of "planning and violence" on the side of aggravation. *See* Ohio Rev. Code § 2929.04. Yet that is exactly what the Ohio Supreme Court did.

If there is any doubt left as to the Ohio Supreme Court's improper approach to the weighing process, respondent's brief confirms it. In attempting to shore up its position, the State quotes an enlightening passage from the Ohio Supreme Court's decision regarding what factors may be considered in the weighing process: "[I]n an Ohio capital case [a sentencing court] 'may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.'" (Resp. 6 (quoting Pet. App. 108a).) That view, however, allows non-statutory aggravators to be weighed against the mitigators, something even respondent agrees "constitute[s] reversible error." And perhaps more importantly, it runs directly counter to the Ohio Supreme Court's subsequent decision in *Ohio v. Wogenstahl*, 662 N.E.2d 311 (Ohio 1996), where the Ohio Supreme Court recognized that its earlier decisions "might be construed to suggest that the nature and circumstances of the offense (such as the cruel and heinous manner in which it was committed) can be included on the aggravation side of the statutory weighing process." *Wogenstahl*, 662 N.E.2d at 322. In *Wogenstahl* the Ohio court rejected this construction, modified its previous decision, and declared that "the nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation." *Id.* (quoting Ohio Rev. Code § 2929.04(B)); (*see also* Pet. 20-23).

Instead of correcting the court's error in considering the nature and circumstances of Mr. Fox's crime, the Sixth Circuit compounded the mistake. In reviewing Mr. Fox's death sentence, the circuit court relied upon *Ohio v. Gumm*, 653 N.E.2d 253 (Ohio 1995), a pre-*Wogenstahl* decision. (*See* Pet. 20-22.) The Sixth Circuit called *Gumm* the Ohio Supreme Court's "most recent discussion of th[e] issue [presented in this appeal]," (Pet. App. 17a.), and said nothing about *Wogenstahl*, a subsequent decision that modified *Gumm*.

Respondent, too, ignores *Wogenstahl*. In fact, it almost entirely ignores Mr. Fox's discussion on this point. The State's bedrock conclusion, that "state and federal courts at every level have stated the law correctly," (Resp. 7-8), overlooks *Wogenstahl* and its pertinent teachings. (*Compare* Pet. App. 108a (court "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors") (internal quotation omitted) *with Wogenstahl*, 662 N.E.2d at 322 ("nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation").) And it also overlooks the Sixth Circuit's failure to cite *Wogenstahl* or apply its teachings to the circumstances surrounding Mr. Fox's death sentence. The inconsistent—and in some places absent—analysis of the lower courts deserves review.

8. Respondent's citation (Resp. 7) to *Tuilaepa v. California,* 512 U.S. 967 (1994), does not change this analysis. There, the Court reviewed California's capital sentencing statute, which presents an exceedingly inapt analogy to Ohio's. California for example does not delineate which factors may be considered on the aggravating and mitigating sides of the scale. *See* Cal. Penal Code § 190.3 ("In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation and sentencer . . . ."). One of those factors, it turns out, is the "nature and circumstances of the present offense," *see id.*, something Ohio's weighing statute does not list as a statutory aggravator. Put simply, while a court may consider the nature and circumstances of a crime as an aggravator if the State's statute allows for it (California), it plainly may not do so when a State's weighing statute forbids it (Ohio).

9. Petitioner's final question also goes largely unrebutted, as does the deep conflict in the lower courts regarding it. As explained in the petition, the Ohio state courts

erred by considering the "Ritchey incident"—an uncharged, untried allegation—as an aggravating circumstance. (*See* Pet. 24-25.) The Ohio Court of Appeals, after reciting the facts of the Ritchey incident, concluded that the "aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt." (Pet. App. 143a.) The Ohio Supreme Court took the same approach, weighing the incident against Mr. Fox even though he "was not charged with any offense against Ritchey." (*Id.* at 108a.) In that court's mind, "the Ritchey offense was part of Fox's social history and background and reflected upon his character" and, it follows, could be weighed against his quest for life. (*Id.*)

Respondents do not, and cannot, deny that the state courts have issued conflicting decisions about whether a court may consider unadjudicated crimes during a capital-sentencing hearing. (*See* Pet. 25-29.) The issue has not gone unnoticed by this Court either. *See id.*; *see also Williams v. Lynaugh*, 484 U.S. 935, 937 (1987) (Marshall, J, dissenting from denial of certiorari and arguing that "[w]hether a State may introduce evidence of unadjudicated offenses in the sentencing phase of a capital trial is a vexing question with respect to which the state courts are in considerable need of guidance"). What was true then is even more true today. The issue is recurring yet remains unresolved. *See Kansas v. Kleypas*, 40 P.3d 139 (Kan. 2001), *petition for cert. filed* (U.S. May 3, 2002) (No. 01-10105) (seeking review on whether state courts may consider unadjudicated offenses in capital sentencing phase). It deserves review.

Instead of challenging the petition on these grounds, respondent primarily opposes review on the theory that the Ohio Supreme Court corrected any error in the lower state courts. (Resp. 8.) That view, however, does not answer the Ohio Supreme Court's own error when it concluded that the "Ritchey offense was part of Fox's social history and background and reflected upon his character." (Pet. App. 108a.) No other part of the Ohio Supreme Court's decision

can, or does, change this part of the decision. Even respondent, to its credit, agrees that the issue is appropriate for review under Mr. Fox's reading of the state courts' decisions. (*See* Resp. 9 ("if those courts had said that . . . other incidents could and should be thrown into the mix" during the weighing phase, "then the fourth question might warrant a closer look").)

CONCLUSION

The petition should be granted.

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